LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUN 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1954~~ 161

HELEN I. WATSON, *Petitioner,*

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REES B. GILLESPIE,
Shoreham Building
15th and H Sts., N. W.,
Washington, D. C.
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provision, statutes and regulations involved	2
Statement	3-7
Reasons for granting writ	7-14
Conclusion	14

Appendix A—Opinions below 1-52

Appendix B—Constitutional provisions, statutes, and regulations involved 53-57

AUTHORITIES

CASES:

Borak v. *United States*, 110 C. Cls. 236, certiorari denied, 335 U. S. 821 12
Boske v. *Commingore*, 177 U. S. 459 11
Carter v. *Forrestal*, 175 F. 2d 364, certiorari denied, 338 U. S. 832 ..... 9, 12
Deak v. *Pace*, 185 F. 2d 997 12
Eichibegoff v. *United States*, 106 C. Cls. 541 12
Gadsden v. *United States*, 111 C. Cls. 487 12
Haas v. *Henkel*, 216 U. S. 426 11
Haynes v. *Thomas*, 232 F. 2d 131 8
Manning v. *Stevens*, 208 F. 2d 827 12
McDonald v. *Lee*, 217 F. 2d 619 11
Money v. *Anderson*, 208 F. 2d 34 12
Mulligan v. *Andrews*, 211 F. 2d 28 12
Myers v. *United States*, 272 U. S. 52 13
Norris v. *United States*, 257 U. S. 77 11
Real Estate Savings Bank of Pittsburgh v. *United States*, 16 C. Cls. 335, Affirmed 104 U. S. 728 11

Page

Simon v. *United States*, 113 C. Cls. 182 ..... 2, 11, 14
Stringer v. *United States*, 117 C. Cls. 30 12
Touhy v. *Ragen*, 340 U. S. 462 10
United States v. *Birdsall*, 233 U. S. 223 11
United States v. *Morehead*, 243 U. S. 607 11
Wickersham v. *United States*, 201 U. S. 390 ..... 8, 14

CONSTITUTIONAL PROVISION:

Article 2, Section 2 ..... (App. 53)

STATUTES:

Act of January 16, 1883, 22 Stat. 403, Section 2, (4) 5 U. S. C. 633, Section 7, 5 U. S. C. 638 ..... (App. 53), 11
Section 1753 of the Revised Statutes, 5 U. S. C. 631 ..... (App. 54), 13
Section 161 of the Revised Statutes, 5 U. S. C. 22 ..... (App. 54), 2, 8, 10, 13
Section 1491, U. S. C. Title 28 ..... (App. 54), 2, 8, 10, 11, 12

REGULATIONS:

Regulation U. S. Civil Service Commission, Federal Personnel Manual, Transmittal Sheet No. 45, dated July 9, 1946. (R. 30-60)
S1-2 ..... (App. 55), 9, 11
S1-21 ..... (App. 56), 5, 11
War Department, Civilian Personnel Regulation No. 105, dated February 23, 1945. (R. 61-63) 13
War Department, Civilian Personnel Regulation No. 60, dated August 28, 1946 ..... (App. 54-55), 2, 4 to 11, incl. 13
Department of the Army, Civilian Personnel Regulation, No. 1, Section 1, dated November 14, 1945 ..... (App. 56-57), 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

HELEN I. WATSON, *Petitioner,*

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Your Petitioner, Helen I. Watson, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in the above-entitled cause dated July 12, 1956 and March 6, 1957.

OPINIONS BELOW

The opinions of the Court below dated July 12, 1956 and March 6, 1957 (Appendix A, *infra,* 1-52) have not yet been reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the Majority Opinion below, holding that an employee has no cause of action when her separation is effected in violation of a personnel regulation of the War Department, CPR 60, issued pursuant to Section 161 of the Revised Statutes, (5 U.S.C. 22), is in conflict with the general jurisdiction of the Court of Claims as defined in 28 U.S.C. 1491 to render judgment upon a claim founded upon a regulation of an executive department.

2. Whether the Majority Opinion below is in conflict with the decision of the Court of Claims in *Simon* v. *United States,* 113 C. Cls. 182, which rested solely upon a violation of a regulation of the Civil Service Commission, and is also in conflict with 28 U.S.C. 1491.

3. Whether the Majority Opinion below, holding that only a violation of regulations issued by the Civil Service Commission creates a right of action, serves to invalidate the great volume of regulations issued by the executive departments and heads of other agencies in matters governing their personnel.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The pertinent constitutional provision, statutes, and regulations involved in this case are set forth in Appendix B., *infra,* 53-57.

STATEMENT

On September 20, 1946, Petitioner passed a competitive civil service examination and was appointed, effective October 10, 1946, to the position of a Clerk-Typist, CAF-2, in the Finance Department of the Army at Fort Bliss, Texas. (hereinafter referred to as the Army. (R. 12)

On April 4, 1947, Petitioner, after having received two efficiency ratings of only "good" (R. 13-14) in which several elements were marked "Outstanding", (plus signs), and none were marked "weak" (minus signs), requested an adjustment of the "Good" ratings. (R. 15)

However, on April 14th, 1947, before any action had been taken on her request for review, she received the following notice from the Army:

> "Due to the fact that your conduct during the probational period of employment in this Installation as a Clerk-Typist, CAF-2, $1954.00 per annum has not been satisfactory to the Agency, your service is this office will be terminated at the close of business on 25 April 1947." (R. 16)

A Notification of Personnel Action, dated April 25, 1947, terminated her services and gave as the reason for Petitioner's removal, "conduct not satisfactory to the Agency, during probational period." (R. 17)

On April 28, 1947, she requested that the Army provide her with a written statement concerning the "specific instances when my conduct was such as could warrant the above [removal] action." (R. 18) She received in reply only the simple statement, "Your attention is invited to Part 9-103, Federal Personnel Manual." (R. 19) As pointed out in the Minority

Opinion, this regulation providing a procedure for separating an employee serving a probationary or trial period did not become effective until May 1, 1947, which was after Petitioner's removal and hence had no application.

On May 13, 1947, Petitioner then requested an opportunity to establish the fact that her separation was contrary to law and Civil Service regulations. She also requested a hearing. (R. 20) She was advised by the Army to take her grievance up with the office of the Civil Service Commission (hereinafter the Commission) at El Paso, Texas. (R. 21)

On August 7, 1947, the Army advised Petitioner that Civilian Personnel Regulation (War Department) No. 60 was applicable to her separation which referred to a "separation for disqualification." (R. 24) The pertinent provisions of this Regulation CPR 60 are as follows: (CPR 60. 3-5, b, c, e(1) and (2))

STATEMENT OF REASONS

"b. Any employee, veteran or nonveteran, graded or ungraded, separated for disqualification will receive a statement setting forth the nature, date, specific reasons for the action, and right to reply. See c below."

REPLY TO REASONS

"c. The employee, if he so desires, may reply to the statement of reasons. No action will be taken to effect the separation under this paragraph of any employee until he has had sufficient opportunity to prepare affidavits or necessary evidence to substantiate his position. The employee's reply will be considered carefully, in order to assure that the separation action is

justified. The reply will be filed with the statement of reasons, except under e below, where a *copy* of the reply will be filed with the statement of reasons."

METHOD OF EFFECTING

"Notification of Personnel Action"

"e. (1) *Statement of reasons.*—The employee will receive the form, 'Notification of Personnel Action,' on or before the effective date of the separation action. There will be entered under 'Remarks' a brief statement indicating the reason for the action.

(2) *Effective date.*—The effective date of the separation action will be determined to allow at least 5 working days after receipt of the statement of reasons." (R. 78)

The applicable Civil Service Regulations in effect at the time of Petitioner's separation (Federal Personnel Manual, dated July 9, 1947, S1-21) provided in pertinent part as follows:

"The notice to a person who is serving a probationary period must include a statement of the reasons for the separation, in writing. The notice to a person serving a trial period need merely state that his conduct or capacity is not satisfactory to the appointing officer." (R. 51)

The notice of removal and the Notification of Personnel Action effecting Petitioner's removal on April 25, 1947 failed to comply with the provisions of either of the regulations referred to above.

Although CPR 60 was cited to Petitioner as applicable to her "separation for disqualification", she had no knowledge that her separation was for other

than "conduct * * * has not been been satisfactory * * *", until she received the Army's letter of August 7, 1947.

So, on August 26, 1947, the Army issued a new Notification of Personnel Action which purported to change the earlier notice of April 14, 1947 to a separation for "disqualification" during the probationary period. (R. 25) Upon protest of this action by Petitioner, the Army wrote Petitioner that a review showed she was not provided with specific reasons for her discharge in writing and would be given a statement outlining the reasons for her discharge with an opportunity to reply. (R. 26) On October 13, 1947, the Army, referring to the fact that under CPR 60.3-5b, it was required to advise Petitioner of the specific reasons for her separation on April 25, 1947, then attempted generally to outline some charges against her to support the separation which had taken place about six months earlier. (R. 27) The removal was made retroactive to April 25, 1947. (R. 25) The error in this procedure is apparent.

Petitioner sought to recover her pay in the Court of Claims for the period from the date of her unlawful separation on April 25, 1947, until October 27, 1950, the date she filed her Petition in the Court of Claims, less earnings during the period. (R. 7) She moved for Summary Judgment on the ground that in attempting to effectuate her removal the Army had admittedly failed to comply with either its own applicable regulations or the applicable regulations of the Commission.

The Court of Claims in denying Petitioner's motion and dismissing her Petition in an opinion in which two Judges dissented held that "it was not the Army

that was empowered by Congress to issue regulations to carry into effect the Lloyd-LaFollette Act, as amended, * * *" even though such Act was not the basis for the regulations (CPR 60) and the amendment referred to was not passed until June 10, 1948, 14 months after Petitioner's removal. The Court went on to hold that the violation of these Army regulations created no cause of action against the United States. Although the applicable Civil Service regulations, which were also violated, were before the Court, they were ignored in the Majority Opinion.

Petitioner moved for leave to amend her Petition in order to give the Court the statutory authority upon which the Army had promulgated its Regulation CPR 60, although the regulation itself was alleged in Par. 4 of her Petition. (R. 5) Petitioner also moved for a New Trial. In denying Petitioner's motion for a New Trial, the Court of Claims, in another opinion in which two Judges again dissented, held that the violation of regulations issued by various executive departments governing their personnel actions created no right of action in the employee. Petitioner's motion for leave to amend her Petition was also denied.

REASONS FOR GRANTING WRIT

The Court of Claims has held that a violation of the regulations issued by an executive department for its guidance governing "the conduct of its officers and *clerks*," creates no right of action in an employee in a suit against the United States for pay. The Regulations of the Civil Service Commission which were also violated in effecting Petitioner's removal have been ignored. Plainly, the result is a decision in conflict with the Statute creating the jurisdiction of the Court

of Claims, 28 U.S.C. 1491, (App. 54) and with this Courts decision in *Wickersham* v. *United States*, 201 U.S. 390, as well as other cases in the Court of Claims. Procedurally improper separations have always given rise to a cause of action in the employee. The decision of the Court of Claims in the instant case to the contrary is manifestly erroneous.

The question here is one of continuing and paramount importance to a large number of new employees entering the Departments and Agencies of the Government each year. Many civilian employees, and those not necessarily in the lower grades, are required to serve a probationary or trial period. *Haynes* v. *Thomas*, 252 F. 2d. 131.

I. The Majority Opinion Holding That Violation of Army Regulations CPR 60 Creates No Right of Action Against the United States Conflicts with 28 U.S.C. 1491 and the Decisions of the Court.

The jurisdiction of the Court of Claims upon claims against the United States generally is provided for in 28 U.S.C. 1491. It provides that the Court shall have jurisdiction to render judgment upon *any* claim against the United States founded upon *any* regulation of an executive department. (Italics supplied) Petitioner has such a claim against the United States and it is founded upon a regulation of an executive department. These are undeniable truths. Moreover, this executive department regulation CPR 60, upon which Petitioner placed great reliance, was issued pursuant to R S 161. (5 U.S.C. 22.) The Act authorized the "head of each department" to prescribe regulations for his department and upon the specific subject of "the conduct of its officers and *clerks*." Regulations under R S 161 have been uniformily

adopted by the executive departments in matters governing personnel problems in a wide field of disciplinary actions. Such was the case of *Carter* v. *Forrestal*, 175 F. 2d. 364, cert. denied 338 U.S. 832. Furthermore, the Commission issued a regulation which permitted any Agency, in the instant case, the Army, to extend separation procedures of the Lloyd-LaFollette Act of August 24, 1912, 37 Stat. 555, (5 U.S.C. 652), to probational employees. Commission regulations S1-2, provides as follows. (R. 32)

> "*Employees covered.*—The procedural provisions of Section 6 of the Lloyd-LaFollette Act apply only to employees in the classified service. The procedures prescribed by that section are not mandatory for probational or trial period employees, for temporary employees (including temporary employees under Section 2 of Temporary Civil Service Regulation VIII), or for employees in positions excepted from the Civil Service Act. The Agency may, however, if it so desires, follow those procedures for probational or trial period employees."

Of five categories of employees referred to in the above regulation, the Army chose to extend the benefits of CPR 60 to only this Petitioner, a probational employee, or to a trial period employee. While the language in the regulation provided that, "The Agency may, however, if it so desires, follow those procedures for probational or trial period employees * * *" is merely permissive, it cannot be denied that the Army elected to avail itself of such procedures, then did illegally invoke them to remove Petitioner, and, upon this record, with a denial of any redress to Petitioner. Clearly, since the Army had earlier made the election to extend the procedures of CPR 60, which were simi-

lar to those of the Lloyd-LaFollette Act, they should have been extended to Petitioner back on April 4, 1947. Even though they were extended on October 13, 1947, they were violated in other respects. The Army specifically provided that "no action will be taken to effect the separation * * * until [She] has had sufficient opportunity to prepare affidavits, etc". This provision had no meaning to Petitioner. No reason was assigned for failure to afford Petitioner the protection of CPR 60 back on April 4, 1947. It is no mere coincidence that CPR 60 had to have the sanction of the Commission. The "Forward" of CPR 60 (R. 65) proves it in one instance, and the Army Regulations CPR 1-1(b) proves it again, (R. 114), and adds 1-2 (R. 114) that such regulations are permanent in nature and except where specifically stated to be otherwise, are mandatory in effect. Upon such a showing, the Majority Opinion concluded that CPR 60 failed to fall within the jurisdictional clause of 28 U.S.C. 1491 (3). If the violations of regulations of the executive departments afford no relief to aggrieved employees, then they are without meaning and serve no useful purpose to the employee. However, a contra rule was applied where the United States assumed the burden, as it is required to do, to defend the validity of a regulation promulgated pursuant to R S 161 for the protection of one of its own executive departments. There the Court was concerned "only with the validity of Order No. 3229 * * *". *Touhy* v. *Ragen*, 340 U.S. 462, 469. In the instant case, CPR 60 went without any attack by defendant below. The Majority Opinion conceded the validity of CPR 60 but concluded that a "violation of them creates no right of action in the employee," contra to the plain language of 28 U.S.C. 1491(3). But here the head of the department per-

mitted CPR 60 to remain in force. Under such circumstances, the Court below took the view that law and justice require that they (regulations) should be upheld. *Real Estate Savings Bank of Pittsburgh* v. *United States*, 16 C. Cls. 335, 350, affirmed 104 U.S. 728; *Boske* v. *Commingore*, 177 U.S. 459; *Norris* v. *United States*, 257 U.S. 77, 81-82; *United States* v. *Birdsall*, 233 U.S. 223, 230-231; *Haas* v. *Henkel*, 216 U.S. 426, 480; *United States* v. *Morehead*, 243 U.S. 607; *McDonald* v. *Lee*, 217 F. 2d 619, 624.

II. Whether the Majority Opinion Below Is in Conflict with the Decision of the Court of Claims in Simon v. United States, 113 C. Cls. 182, Which Rested Solely Upon A Violation of A Regulation of the Civil Service Commission, and Is Also in Conflict with 28 U.S.C. 1491.

Petitioner relied upon Civil Service Regulations S1-2 which provided in its pertinent part as follows:—

> "The notice to a person who is serving a probationary period must include a statement of the reasons for the separation, in writing * * *." (R. 51)

This regulation is mandatory and was promulgated pursuant to Section 2 (Fourth) of the basic Civil Service Act of 1883. (A. 53) The Majority Opinion below ignores the above Civil Service Commission Regulation and Civil Service Commission Regulation S1-2. (App. 55-56) However, since no statement of the reasons was given Petitioner upon her removal on April 25, 1947, her removal was procedurally defective. In the *Simon* Case, Supra, plaintiff was denied the benefits of a reduction in force regulation issued by the Commission pursuant to the 1883 Act. The Court relied upon the "broad jurisdiction conferred by Sec-

tion 1491 U.S.C. Title 28, Supra" to support a cause of action for compensation. It is well-recognized that an employee separated without compliance with the procedural safeguards, whether contained in a statute, executive order, Civil Service Commission regulation or Agency regulation, is entitled to restoration to duty, with a right of action to recover pay. *Carter* v. *Forrestal*, 175 F. 2d 364; *Deak* v. *Pace*, 185 F. 2d 997; *Money* v. *Anderson*, 208 F. 2d 34; *Mulligan* v. *Andrews*, 211 F. 2d 28; *Manning* v. *Stevens*, 208 F. 2d 827; *Elchibegoff* v. *United States*, 106 C. Cls. 541; *Stringer* v. *United States*, 117 C. Cls. 30; *Borak* v. *United States*, 110 C. Cls. 236; *Gadsden* v. *United States*, 111 C. Cls. 487.

The Majority Opinion below held (App. 2) that Commission Regulations required a notification "in writing of the reasons of his separation and its effective date." That this was accomplished when she was told that her "conduct has not been satisfactory. * * *" This was no more than a mere conclusion. Petitioner could do no more than enter a general denial and she could not, therefore, properly defend herself. The Army recognized about six months later that Petitioner had not been given the reasons for her removal, and then purported to give them to her. Again Petitioner states that the Commission regulation referred to by the Court, as above recited, did not become effective until May 1, 1947.

III. The Majority Opinion Below Serves to Invalidate All Personnell Regulations Issued by the Departments and Agencies, Save Those Issued by the Civil Service Commission.

The importance of the Majority Opinion below, is apparent when it is considered that it will invalidate the great volume of personnel regulations issued by the

various executive departments in matters directly affecting their personnel. Many such regulations, described in charts, cover a wide field of minor offenses and provide slight penalties. As the same minor offenses are repeated so the penalties become more severe.

The Majority Opinion states that only regulations of the Commission have the force and effect of law, yet no effort was made by defendant below to show the invalidity of CPR 60. Since CPR 60 is a valid regulation under R S 161, it has the force and effect of law. R S. 161 is derived from the Act of Congress of July 27, 1789, Ch. 4, 1 Stat. 28. It was signed by President Washington. *Myers* v. *United States,* 272 U.S. 52, 115. It is significant that another War Department CPR bearing the number 105, (R. 61-63) dealt with "Employee Grievances", was promulgated pursuant to R. S. 1753. (App. 54) CPR refers to 4 other CPR's, among them being CPR 60-3 and 60. In CPR 60, involved herein, references are made to 16 other CPR's, among them being CPR 105. If the violation of these Civilian Personnel Regulations of the War Department have no standing in the Court of Claims some means or methods should be devised to inform those who now serve and may be punished under them. If and when so informed, many persons, who would otherwise remain in the Government Service for a career, would be loathe to do so, upon the sole premise they could have no assurance of any protection. As to those who have been previously punished in strict compliance with the safeguards contained in *such regulations*, it would be urged by defendant below that the action was legal. (Italics supplied)

Petitioner urges that the Majority Opinion is in conflict with the decision of this Court in the *Wickersham* case. Supra, and is such a departure from the Court of Claims decision in the *Simon* case, Supra, where the identical question raised here in the Majority Opinion was there rejected, as should call for the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be granted.

REES B. GILLESPIE,
Shoreham Building
15th and H Sts., N. W.,
Washington, D. C.
Counsel for Petitioner.

In the United States Court of Claims

No. 49895

(Decided July 12, 1956)

HELEN I. WATSON v. THE UNITED STATES

Mr. Rees B. Gillespie for the plaintiff.

Miss Frances L. Nunn, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover the salary allegedly due her from April 25, 1947, the date on which she was removed from her position with the Army Finance Office, to the date of the filing of her petition in this court, October 27, 1950.

After passing a competitive Civil Service examination, plaintiff, on September 20, 1946, received a probational appointment, effective October 10, 1946, to the position of clerk-typist, CAF-2, in the Finance Department of the United States Army, Fort Bliss, Texas.

After a little less than six months service, plaintiff was discharged because "your conduct—during the probational period of employment in this Installation as a Clerk-typist, CAF-2, $1,954.00 per annum—has not been satisfactory to the Agency." At the time it was not explained to her in what respect her conduct was unsatisfactory, but about six months later, after considerable correspondence between plaintiff and several different officers, Colonel Ahearn wrote her that this was because she had complained that the work assigned her was beneath her training and ability, that she took a superior attitude toward her superiors and the work assigned to her, and that she had insisted that any criticism of her work by her superiors should be put in writing.

Plaintiff was given no hearing. We held in *Nadelhaft* v. *United States*, 132 C. Cls. 316, that plaintiff was not entitled to one; that a probationary employee was not in the classified civil service and did not become a member of it until his period of probation was over and he had received a permanent appointment; that the provisions of that Act, requiring the service of charges on an employee, allowing time for an answer and the filing of affidavits and a written decision on the charges, had no application to a probationary employee. We said:

> In short, we are of the opinion that a probationary appointee acquires no right to the office, that is to say, a right protected by the Lloyd-LaFollette Act, as amended. His right to the office and protection by this Act only accrues after the probationary period has expired and his appointment becomes permanent.

We said further in that case that the Civil Service regulations relating to the removal of probationary employees only require that the employee shall be notified "in writing of the reasons for his separation and of its effective date." This was done in the case at bar. She was told that she was being removed because her "conduct—during the probational period of employment in this Installation as a Clerk-typist, CAF-2, $1,954.00 per annum—has not been satisfactory to the Agency."

It is true that Army Personnel Regulations prescribed a more elaborate procedure for the removal of a probationary employee; but it was not the Army that was empowered by Congress to issue regulations to carry into effect the Lloyd-LaFollette Act, as amended, but the Civil Service Commission. Since Congress vested in that agency the power to issue regulations to carry the Act into effect, its regulations reasonably designed for this purpose have the force and effect of law. Hence, if an employee's rights under these regulations have been violated, he may recover salary of which he has been deprived thereby.

But not so of the regulations of any other agency, because Congress gave to no other agency the power to make regulations.

The United States is not liable for a money judgment for the violation of any regulation that does not have Congressional sanction. Only Congress can create, either directly or indirectly, a cause of action against the United States.

There has been no violation of the regulations of the Civil Service Commission, as we held in the *Nadelhaft* case, *supra*.

Plaintiff's motion is denied, on the authority of that case, and her petition is dismissed.

It is so ordered.

LARAMORE, *Judge;* and JONES, *Chief Judge*, concur.

LITTLETON, *Judge*, with whom MADDEN, *Judge*, concurs, dissenting:

We cannot agree with the opinion of the majority in this case. Relying mainly on the majority opinion of the court in the case of *Nadelhaft* v. *United States*, 132 C. Cls. 316, the majority opinion in the instant case holds that a "probationary appointee" acquires no right to the office which is protected by the Lloyd-LaFollette Act, as amended (62 Stat. 354, 5 U. S. C. 652), and that the Civil Service regulations relating to the removal of probationary employees require only that such employee be notified "in writing of the reasons for his separation and of its effective date." The majority found that plaintiff was given the notice required by the regulation mentioned when she was told that she was being removed because her "conduct during the probational period of employment in this Installation as a clerk-typist, CAF–2, $1,954.00 per annum, has not been satisfactory to the Agency." The majority also holds that failure of the employing agency, the United States Army, to accord to this plaintiff the procedural safeguards contained in its own regulations with reference to the separation of probationary employees, gives rise to no cause of action in this court because "it was not the Army that was empowered by Congress to issue regulations to carry into effect the Lloyd-LaFollette Act, as amended, but the Civil Service Commission." The court notes that while the Civil Service regulations have the force and effect of law, those of the Army do not. It is the judgment of the majority that plaintiff's motion for summary judgment be denied and that her petition be dismissed.

We disagree with the majority's disposition of this motion for three general reasons. First, we believe that the Civil Service regulation applicable to and relied on by this plaintiff was not complied with by the employing agency. Second, we think that the War Department Civilian Personnel Regulations No. 150 and No. 60 were valid regulations having the force and effect of law and that noncompliance with them in plaintiff's case gave rise to a claim founded upon the regulations of an executive department under this court's general jurisdiction. Third, inasmuch as defendant has not filed a cross motion for summary judgment, and because plaintiff's petition and defendant's answer thereto raises another issue not made the basis for plaintiff's motion, i. e., that her discharge during her probationary period was unlawful because arbitrary, summary judgment should not be rendered for defendant, the non-moving party. In fact defendant resisted plaintiff's motion for summary judgment because of the allegations of arbitrary action in plaintiff's petition, which allegations were denied by the answer. Despite the fact that the majority feels that none of plaintiff's procedural rights under Civil Service regulations were violated on the facts presented by plaintiff's motion for summary judgment, plaintiff is entitled to proceed with that part of her case on which her motion was not based and which is directly controverted by defendant's answer.

Regarding our first ground for dissent, i. e., that plaintiff's procedural rights under Civil Service regulations were violated in that the notice of her separation did not comply with the regulations prescribing the contents of such a notice, we believe a fuller statement of the facts is required.

On September 20, 1946, plaintiff received a probational appointment, effective October 10, 1946, to the position of Clerk-typist, CAF-2, in the Finance Department of the United States Army, Fort Bliss, Texas. Plaintiff received her appointment after passing a competitive Civil Service examination.

On January 7, 1947, plaintiff received two reports of efficiency rating, one covering her performance of duties from October 10, 1946, to December 16, 1946, and marked "Administrative—Unofficial," and one covering her performance from October 10, 1946, to December 31, 1946, marked "Special."

Each report showed a rating of "Good" with several elements marked "Outstanding" and with none marked "Weak." Among the elements marked as "Outstanding" on the first report, were "maintenance of equipment, tools, instruments"; "skill in the application of techniques"; "industry"; "rate of progress on or completion of assignments", and "*dependability.*" [Italics ours.] On the second report the elements rated as "Outstanding" were "presentability of work (appropriateness of arrangement and appearance of work)"; "attention to pertinent detail"; "industry", and "dependability."

On April 4, 1947, plaintiff wrote to Major W. J. Warren, Chairman of the Efficiency Rating Board of Review, Finance Office, U. S. Army, Fort Bliss, Tex., as follows:

> Reference is made to my efficiency rating of "Good", covering period from 10 October 1946 to 31 December 1946.
>
> I feel that this rating has not been based upon performance of the job, but rather on personal feelings—thus I am hereby requesting an adjustment of same.
>
> If the Committee sees fit to review the facts in the case, I further request I be allowed to meet with them, in my own behalf.

On April 14, 1947, before any action had been taken on plaintiff's request for a review of her rating, Major Warren, in his capacity of Finance Department Assistant, wrote plaintiff as follows:

> Due to the fact that your conduct—during the probational period of employment in this Installation as a Clerk-typist, CAF–2, $1,954.00 per annum—has not been satisfactory to the Agency, your services in this office will be terminated at the close of business on 25 April 1947.

A notification of personnel action, dated April 25, 1947, gave as the reason for plaintiff's removal "conduct not satisfactory to the Agency, during probational period."

On April 28, 1947, plaintiff wrote to Major Warren requesting a written statement concerning the "specific instances when my conduct was such as could warrant the above [removal] action." The reply of Major Warren, on the same date, merely stated:

> Your attention is invited to Part 9–103, Federal Personnel Manual.[1]

On May 13, 1947, plaintiff wrote Colonel W. E. Ahearn, Finance Officer at Fort Bliss, and requested an opportunity to establish the fact that her separation was contrary to law and Civil Service regulations. She also requested a hearing. On the following day, Colonel Ahearn wrote to plaintiff advising her that she should take her grievance up with the local office of the Civil Service Commission in El Paso, and that "no further action is contemplated by this office."

On May 8, 1947, plaintiff wrote to the Commanding General, Headquarters, Fourth Army, Fort Sam Houston, Tex., telling him that she had been discharged for unsatisfactory conduct, a charge which she felt she could prove was without foundation. She told the General that she had been unable to secure copies of the applicable regulations from the Army Finance Personnel Office and asked him to have sent to her "WD Civilian Personnel Regulation #105 (23 Feb. 1945)" and "Memorandum #10, Hq. Fourth Army (27 Jan. 1947)." On June 18, 1947, Major Newbury of the Civilian Personnel Branch undertook to answer plaintiff's letter of May 8, to the Commanding General. He advised her that a review of her discharge indicated that the action was taken in strict conformance with War Department and Civil Service regulations. As to her request for specific reasons and for copies of applicable regulations, the major stated:

> Although it is regretted that the explanations given to you were not satisfactory from your point of view and that regulations were not readily available in your area, the action taken by the Finance Office was in compliance with pertinent rules and regulations, and is therefore considered final.

The major did not send Regulation No. 105 as requested by plaintiff. That regulation set forth the procedure to be

---

[1] Section 9.103 of Title 5, Code of Federal Regulations, 1947 Supplement, provides in part as follows:

"*Procedure in separating employee serving a probationary or trial period.* (a) Any person serving a probationary or trial period shall be given a full and fair trial in the performance of the duties of the position to which appointed. If the performance of his duties or his conduct is not satisfactory to the agency his services shall be terminated by notifying him in writing of the reasons for his separation and of its effective date. • • •" This regulation did not go into effect until May 1, 1947, subsequent to plaintiff's removal, and, therefore, had no application.

followed when an employee wished to protest a discharge for unsatisfactory conduct.

On August 7, 1947, Major Newbury again wrote to plaintiff and in that letter he referred to her separation as a "separation for disqualification" and noted that Civilian Personnel Regulation No. 60 was applicable to her situation and not Regulation No. 105. Although it is true that the latter regulation does not apply to a separation for "disqualification," plaintiff had no knowledge that her separation was for other than "unsatisfactory conduct," as stated in previous letters and official notices, until receipt of the letter of August 7, 1947. On August 26, 1947, Major Warren issued a new Notification of Personnel Action which purported to change the earlier notice of April 25, 1947, to indicate that the nature of plaintiff's termination was a separation for disqualification during probationary period rather than a separation for "conduct not satisfactory to the Agency during probational period." The effective date of this notification was April 25, 1947, the date of the first notice.

On August 28, 1947, plaintiff addressed a protest to the Grievance Board, Office of the Secretary of the Army, which was forwarded to Major Newbury for action and reply. On October 6, 1947, Major Newbury wrote to plaintiff, in part, as follows:

> You have previously been advised that as you were separated while serving a probational period, you were excluded from grievance procedure as set forth in CPR 105. *However, a review of the matter reveals that you were not provided with specific reasons for your discharge in writing* and an opportunity to reply.
>
> The Finance Office, U. S. Army, Fort Bliss, has been advised that you be given a statement outlining specifically the reasons for the adverse action and an opportunity to reply within a reasonable time. Your reply will be reviewed by that office and a final decision based thereon will be made.
>
> *This office feels that the administrative prerogative vested in the Finance Officer, U. S. Army, cannot be questioned when exercised judiciously and within existing rules and regulations.* [Italics supplied.]

On October 13, 1947, Colonel Ahearn wrote plaintiff stating that pursuant to the direction of the Chief of Finance, and in accordance with Civilian Personnel Regulation 60.3–5*b*,

the Finance Office was required to inform her of the specific reasons for her separation from duty on April 25, 1947. In general, the charges outlined in this letter were that plaintiff had indicated to her superiors that she did not consider the work assigned to her up to her training or ability, that she had displayed a superior attitude, and that she had insisted that the Branch head decisions be given to her in writing, and that she had complained of the efficiency rating she had received.

Subsequent to her first notice of dismissal by the Army, plaintiff conferred with a Miss Eleanor Lytle of the Civil Service Regional Office in El Paso, Texas, and was informed that because she was serving a probationary appointment she was not entitled to *any* relief before the Civil Service Commission.

On December 12, 1950, plaintiff secured employment with the Veterans Administration in Washington, D. C., where she worked until separated by a reduction in force on October 16, 1953. On December 7, 1953, plaintiff was employed by the Department of Justice and was still employed there on the date of the filing of her motion for summary judgment in November 1955. Since her reemployment by the Government plaintiff has received "Satisfactory" efficiency ratings and has been promoted three times.

Plaintiff, by affidavit accompanying her Motion for Summary Judgment, states that from April 25, 1947, when she was discharged by the Army, to October 27, 1950, the date on which her petition was filed, she earned $3,173.33. In this suit plaintiff seeks to recover the difference between the amount thus earned and the $8,175.82 she would have earned had she continued in the employ of the Army up to the date of her petition on October 27, 1950, or $5,001.49.

Plaintiff's motion is based entirely on the ground that the petition and documents supporting her motion establish that on the occasion of both attempted removal actions, the Army Finance Office failed to comply with either the applicable Civil Service regulations or War Department regulations.

The Civil Service regulation relied on by plaintiff and which defendant concedes is the one which prescribes the contents of the "notice" of separation of a person serving a probationary period, is as follows:

> The *notice* to a person who is serving a *probationary period must include* a statement of the reasons for the separation, in writing. The notice to a person serving a *trial period* need *merely* state that his conduct or capacity is not satisfactory to the appointing officer. [Italics supplied.]

The above regulation is found in Chapter S1, at page 21, of the Federal Personnel Manual, July 9, 1946, and represents a summary in one regulation of the contents of two more detailed regulations, one of which relates to the contents required in the notice of separation of a *probationary* employee, and the other of which relates to the contents required in the notice of separation of a war service appointee serving a *trial period*.

A person, such as the plaintiff herein, who was selected from a Civil Service register for appointment to a position in which she might ultimately acquire classified civil service status, was required by the Civil Service Act of January 16, 1883, 22 Stat. 403, to serve a probationary period of whatever length the Commission might prescribe, and upon the successful completion of that probationary service, the appointee acquired classified civil service status.

A person appointed as a war service employee under the War Service Regulations issued by the Civil Service Commission, pursuant to Executive Order 9063, February 16, 1942, and Executive Order 9243, September 12, 1943, was required to serve a *trial* period of one year, upon the successful completion of which the appointee did *not* acquire civil service status.[2]

The Civil Service regulations governing the separation from Government service of persons serving a probationary period were entirely different from those governing the separation of persons serving a war service trial period. Civil Service Rule VII, Sec. 7.2 (3) provides as follows:

> *Probationary appointment.* A person selected for appointment shall be duly notified by the appointing officer and upon accepting and reporting for duty shall

---

[2] The Civil Service Personnel Manual of April 21, 1947 provides at p. S2-17 as follows:

"Some appointments are made subject to the serving of a probationary period: under war service regulations, some appointments were made subject to the serving of a trial period."

> receive from such officer a certificate of probational appointment. * * * If and when, after a full and fair trial, the conduct or capacity of the probationer is not satisfactory to the appointing officer, the probationer may at any time thereafter during this period be so notified in writing, *with a full statement of reasons*, and *this notice* shall terminate his service. [Italics supplied.] [Code of Federal Regulations, Cum. Supp., Title 5, p. 1448.]

We should like to emphasize at this point that the above-quoted Civil Service regulation was *not* issued pursuant to the Lloyd-LaFollette Act of 1912, which act (being section 6 of the Post Office Appropriations Act for the year ending June 30, 1913), provided for the several procedural steps which must be taken in separating from Government service a person in the *classified civil service*. It has always been the position of the Civil Service Commission, which was agreed to by the majority of this court in the *Nadelhaft* case, *supra*, that the above-mentioned section 6 of the 1912 act has no application to persons serving a probationary period, but the controlling regulations of the Commission regarding probational employees were not issued pursuant to the provisions of that act. On the contrary, the above-quoted Civil Service regulation was issued pursuant to Revised Statutes, Sec. 1753 (2d Ed.), and the act of January 16, 1883, *supra*.

Section 1753 of the Revised Statutes provides as follows:

> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service. [Revised Statutes, 2d. Edition 1878, 312.]

The above section is merely a restatement of the provisions of section 9 of the act of March 3, 1871, 16 Stat. 495, 514, 515.

The act of January 16, 1883, 22 Stat. 403, entitled "An act to regulate and improve the civil service of the United States" provides for the establishment of the Civil Service Commission with three commissioners to be appointed by the Presi-

dent. Section 2 sets forth the various duties of the commissioners, in part, as follows:

> FIRST. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.
>
> * * * * *
>
> FOURTH, that there shall be a period of probation before any absolute appointment or employment aforesaid.

Section 7 of the 1883 act provided, in part:

> * * But nothing herein contained shall be construed * * * to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes [Revised Statutes] * * *.

It seems quite clear to us, even without the citation of authority contained in the Code of Federal Regulations, that Regulation 7.2 (3) relating to the separation notice of a probationary employee, was issued pursuant to section 1753 of the Revised Statutes and section 2 of the act of January 16, 1883, and not under section 6 of the Lloyd-LaFollette Act of 1912 (37 Stat. 539, 555) or the amendment thereto in 1948 (back pay statutes) (62 Stat. 354), which latter two acts contain no provision whatever for the issuance of regulations thereunder by any one. We do not believe that anyone could seriously suggest that section 6 of the so-called Lloyd-LaFollette 1912 Act or its amendment, which merely provide for the steps which must be taken to remove a classified civil servant, were intended to repeal or modify the Civil Service Act of 1883.

The Civil Service Commission had full authority to make Regulation 7.2 (3) relied on by plaintiff. The act under which it was made clearly authorized and justified it and there is nothing in the Lloyd-LaFollette Act of 1912 which repealed or in any way modified the authority of the Civil Service Commission to do what it had done under the act of 1883. The statutes relating to Civil Service employees of the United States are enacted for the benefit and protection of the

employees and unless there is some clear and positive provision in the statute which takes away from the Civil Service Commission or from the department concerned authority to make a regulation upon which the civil service employee relies, those regulations must be strictly complied with. We think it is clear in this case that the regulation was not complied with.

We have then a valid regulation of the Civil Service Commission which requires that when, after a full and fair trial, the conduct or capacity of a *probationer* is not satisfactory to the appointing officer, such probationer may be separated but he or she must have from the employing agency a notice of separation containing a "full statement of reasons" why such conduct was not satisfactory. Plaintiff, a probationer, did not receive any such "full statement of reasons" until long after her separation was an accomplished fact. She merely received a notice which stated that "your conduct during the probational period of employment in this Installation * * * has not been satisfactory to the Agency." That plaintiff's conduct was "not satisfactory" to the agency was the circumstance required to be in existence by the regulations before the agency could proceed to remove the probationer, but a mere statement that the agency was not satisfied with the probationer's conduct, did not comply with the regulations requiring that the notice of separation contain a full statement of the reasons *why* the probationer's conduct was not satisfactory to the agency. The giving of reasons long after the date of plaintiff's separation did not cure this defect.

If this plaintiff had been serving a war service trial period, the notice stating that her conduct was not satisfactory to the employing agency would have been sufficient and in compliance with War Service Regulation 18.5 (c) which provides as follows:

> (c) Trial period. Except for persons appointed for a specific period of one year or less, the first full year of service shall be a trial period, satisfactory completion of which shall be considered part of the entrance examination. If and when, after a full and fair trial during this period, the conduct or capacity of the trial appointee be not satisfactory to the appointing officer,

> the appointee may at any time thereafter during the trial period *be so notified* in writing and such notice shall terminate his service. [Code of Federal Regulations, Cum. Supp., Title 5, p. 1463.]

But this plaintiff was not a war service appointee serving a trial period. She had passed a competitive civil service examination, had been placed on the Civil Service Register, and received her appointment from such register. Such appointment was made strictly in compliance with section 2 of the 1883 Civil Service Act, *supra*, and the regulations regarding her appointment and her separation during the probationary period were made under authority of that act and also section 1753 of the Revised Statutes. That regulation, requiring that her notice of separation contain a full statement of the reasons *why* her conduct was not satisfactory to the employing agency, was not complied with. Inasmuch as this court has jurisdiction over claims founded upon "any regulation of an executive department," plaintiff has clearly established a right to recover in this case. *Simon* v. *United States*, 113 C. Cls. 182. We do not know precisely why the Civil Service Commission in its rules provided that a war service appointee serving a trial period might be separated on a notice which merely stated that his conduct or services had not been satisfactory to the employing agency, whereas a person serving a probationary period under a regular civil service appointment must, prior to his separation from such position, be given a written statement *of the reasons why* his conduct or services were not satisfactory to the employing agency. We suppose it was because the Commission believed that the separation of a probationary employee who would probably become a career employee, was a more serious matter than the separation of a trial war service employee. The Civil Service Act of 1883 requires, among other things, the giving of examinations, the compiling of registers for the innumerable positions in the Government covered by that act, and the selection from those registers of eligibles. It also requires that a person selected for appointment in the regular civil service must serve a probational period before his appointment becomes absolu[illegible] Such an elaborate procedure requires time and expense both on the part of the Government and of the private citizen

who seeks a civil service appointment in the regular service. None of these steps are required before a war service employee may be hired, but such an employee does not acquire permanent status in the regular civil service.

Although a person serving a probational appointment preliminary to the acquisition of a permanent civil service status has no appeal from the decision of his employing agency to dispense with his services, we think that the requirement in the Civil Service regulations that he be advised in writing of the full reasons why his services or conduct were not satisfactory, provides a needed protection both to the employee and to the Government itself. It is certainly in the best interest of the Government which has gone to the trouble and expense of holding examinations and determining the qualifications of the employee, and of the employee who has gone to the trouble of meeting the statutory requirements for a particular job, that the employee's separation from that job not depend on the whim or personal dislike of another Government employee who happens to be his superior or supervisor. Although the requirement that the supervisor set down in writing the reasons why the probationer's conduct and services are not satisfactory to him may not seem a difficult or formidable one, it is, we think, a real protection for both the Government service and the employee involved against arbitrary, capricious and, of necessity, expensive and wasteful determinations by supervisors to get rid of a probationer whom they do not like but who is otherwise qualified in every way for the position held, and whose conduct and services are actually satisfactory.

In holding that the regulation requiring that a probationer whose discharge is desired be notified in writing of the full reasons why his conduct or services are not satisfactory to the employing agency *has been complied with*, when that employee is *merely* told that his services and conduct are not satisfactory and no reasons therefor are given, or where the reasons are given months after the separation takes place, we think the majority is destroying for all practical purposes the only protection the Government and the employee have that the expense and trouble gone to by both in making and

securing the probationary appointment shall not be wasted by the whim of some other employee in the agency.

We think that the reliance by the majority on the case of *Nadelhaft* v. *United States*, *supra*, is misplaced. Although Nadelhaft, who was appointed October 9, 1950, was separated from Government service while serving a probational appointment, that is the *only* fact which his case and the instant case have in common. Nadelhaft, a probational appointee, was, during the probationary period, suspended under the United States Loyalty Program. Following a full notice and service of charges, a hearing, and an appeal before the Loyalty Review Board of the Civil Service Commission, Nadelhaft's removal was found to be unwarranted and he was restored to his position in the Government service, but he was not given his back pay for the period of his suspension. Nadelhaft brought suit in this court to recover the back pay he claimed he was entitled to receive under section 6 (b) of the amendment in 1948 to the Lloyd-LaFollette Act, *supra*. He did *not* claim that any of the procedural safeguards relating to his separation had not been complied with. He merely stated that because he had been suspended and then reinstated, section 6 (b) of the 1948 Act required that the *employing agency* pay him his salary. He brought his claim in this court as one founded upon an act of Congress, i. e., the act of June 10, 1948. The court held that the mandate in that act to the employing agency to give back pay related only to persons "in the classified civil service" and that until a probational appointee had successfully completed his probationary term of service, he had not acquired such civil service status as would entitle him to back pay upon reinstatement. Dictum in the decision in that case indicates that the court would also have held that Nadelhaft would have had no cause of action had he claimed that the procedural requirements of section 6 (a) of the 1948 Act or of Section 6 of the 1912 Lloyd-LaFollette Act were not followed. There seems no point, however, in extending that dictum to the instant case, as the majority does in quoting from the *Nadelhaft* case, as follows:

> In short, we are of the opinion that a probationary appointee acquires no right to the office, that is to say,

> a right protected by the Lloyd-LaFollette Act, as amended. His right to the office and *protection by this Act* only accrues after the probationary period has expired and his appointment becomes permanent. [Italics supplied]

We are of this opinion because plaintiff Watson *is not claiming the protection of the Lloyd-LaFollette Act* nor is she claiming that she has any rights under that act. She is merely claiming the protection of a valid regulation issued, not pursuant to the Lloyd-LaFollette Act, or its amendment, but pursuant to the 1883 Civil Service Act and to section 1753 of the Revised Statutes relating to the Civil Service. That act (1883) provides for probational appointments and gives the Civil Service Commission the authority to issue regulations concerning such appointments. The regulation relied on by plaintiff was issued in compliance with those acts and was not complied with by the War Department *when it discharged her*. For the violation of a right protected by such a regulation, plaintiff is entitled to recover. *Simon* v. *United States*, *supra*,

Plaintiff also claims that she is entitled to recover because certain War Department regulations regarding the procedures to be followed in removing a probationary employee were not followed in her case. The majority holds that the Army regulations relied on by plaintiff do not have the force and effect of law because only the Civil Service Commission was authorized by the Lloyd-LaFollette Act to issue regulations carrying that act into effect. As noted earlier herein, the authority of the Civil Service Commission to issue regulations relative to Government employees (whether civil service, war service, temporary, etc.) originates not from the Lloyd-LaFollette Act but from its general regulatory power granted in the Revised Statutes and the Civil Service Act of 1883. Section 2 of the latter act provides that the Commission should aid the President by preparing suitable rules for carrying the act into effect, and that when such rules have been promulgated, "it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate *to aid, in all proper ways*, in carrying said rules, and any modifications thereof, into effect."

The two regulations issued by the War Department (and War Department Regulations are approved by the President) and relied on by plaintiff, No. 105 and No. 60, provided a clear and specific procedure to be followed in separating a probationary employee, which procedure was somewhat similar to that outlined and required in section 6 of the 1912 Act and in section 6 (a) of the 1948 amendment to the Lloyd-LaFollette Act.

With respect to the coverage of employees by section 6 of the Lloyd-LaFollette Act, the Civil Service regulations provide as follows:

> *Employees covered.* The procedural provisions of section 6 of the Lloyd-LaFollette Act apply only to employees in the classified service. The procedures prescribed by that section are *not mandatory for probational or trial period employees*, * * *. *The agency may*, however, if it so desires, follow those procedures for probational or trial period employees. [Civil Service Personnel Manual, S1-2.]

The above regulation appears to us to be a "suitable rule" for carrying into effect the 1883 Act relating generally to the Civil Service. Although the Lloyd-LaFollette Act contained no direction to issue regulations, the Commission had sufficient power to issue regulations concerning that Act by virtue of its general legislation, and we think that it also had the power to issue the regulation in question permitting any agency (in this case the War Department) so desiring to extend the separation procedures of section 6 of the 1912 Act to probational employees. Pursuant to the clear and specific authority contained in that regulation, the War Department elected to make a clear regulation extending the substance of the procedural safeguards of section 6 of the 1912 Act to its probational employees by the issuance of Regulation 105 and Regulation 60 applicable to civilian personnel in the War Department. At the beginning of War Department Regulation No. 60, the following statement, signed by order of the Secretary of War, appears:

> The attached Civilian Personnel Regulation No. 60, Revised, 28 August 1946, supplements chapter S1, Separation, United States Civil Service Commission Federal Personnel Manual. Portions of the referenced chap-

ter of the United States Civil Service Commission Federal Personnel Manual governing furlough and suspension are supplemented by Civilian Personnel Regulation 60.

[AG 230 (22 Aug. 46)]

These two regulations of the War Department, approved by the President, issued pursuant to a valid regulation of the Civil Service Commission, which in turn was issued pursuant to Section 2, FIRST, of the Civil Service Act of 1883, have, we think, the force and effect of law, to the same extent as if the Commission had issued them directly and the failure of the War Department to follow the procedures outlined therein in separating this probational employee gave rise to a cause of action against the United States founded upon the valid regulation of an executive department, pursuant to express provision of our jurisdictional act.

Again we wish to call the attention to the fact that this plaintiff is not claiming the benefit of the provisions of the Lloyd-LaFollette Act, but rather the benefit of valid regulations of the War Department, which, in effect, incorporated and required to be followed in cases involving the separation of probational employees of the War Department, procedures *similar to* and in substance the same as those contained in the Lloyd-LaFollette Act which were mandatory in the separation of classified civil service employees.

The War Department left no doubt as to its reasons for making the rules it did in connection with the discharge of a person serving a probational appointment. At the beginning of Civilian Personnel Regulation 60 the statement is made by the War Department that "Separation is a personnel action which results in the loss of an employee from the Department." In its statement of policy concerning involuntary separations, the regulation states, in part, as follows:

> 3–1. It is the policy of the Department to afford maximum protection to its employees against arbitrary or inequitable action in separations. The circumstances surrounding separation actions will be investigated completely and made a matter of record.

It is obvious from the above that the War Department was as concerned, as we have suggested the Civil Service Commission was, with avoiding waste occasioned by unnecessary

turnover in personnel and also with avoiding the possibility of arbitrary and inequitable treatment of employees. In giving to the War Department and other Government agencies the right to promulgate personnel regulations in addition to those issued by the Civil Service Commission, the Commission apparently felt that it could not possibly issue rules and regulations which would cover all of the peculiar circumstances which might exist in the many Government agencies and that in many instances it would be wisest to leave to those departments familiar with conditions and circumstances the option of promulgating their own rules and regulations as long as they did not conflict with law. Nothing in the two War Department regulations in question is in conflict with any statute, or any other regulation of the Commission. They are certainly not in conflict with the Lloyd-LaFollette Act which, while it makes the separation procedures outlined therein mandatory for persons having civil service status, *does not forbid* expressly or by necessary implication the use of the same procedures for others who do not have such status. We think that it was clearly within the power of the Civil Service Commission to extend the provisions of the Lloyd-LaFollette Act to the separation of probationary employees if the Commission felt that in so doing it was effectuating the purposes of the Civil Service Act of 1883. This the Commission did not do. Instead, the Commission issued the rule *permitting* the various Government agencies to extend the Lloyd-LaFollette Act separation procedures to their employees who had not yet acquired civil service status if the Government agency desired to do so.

The provisions in War Department Civilian Personnel Regulations 105 and 60 relied on by plaintiff were issued pursuant to the express permission of the Civil Service Commission issued in a valid regulation under the Civil Service Act of 1883. We think that this court should be very reluctant to declare such regulations of the War Department to be invalid and without force and effect. Those regulations have been in use for many years in the department. Undoubtedly other Government agencies, wishing to avoid unnecessary personnel turnover and arbitrary treatment of new employees, have taken advantage of the same Civil Service regulation permitting the promulgation by Government

agencies of similar regulations. The casting of doubt upon the validity of such departmental regulations may well cause incalculable harm both to the department and to its employees.

We think it is clear from the following facts of record in which we deal fully with Regulation No. 60, that the War Department failed to comply with its own regulations regarding the dismissal of plaintiff, a probational employee.

In its letters to plaintiff following her separation on April 25, the War Department admitted that Regulation 105 was applicable to her case. However, it did not comply with her request to give her a copy of that regulation, nor did it follow the procedures outlined therein in connection with her separation.

On August 26, 1947, the Army issued a new Notification of Personnel Action in which it purported to correct the former notice of April 25, by changing the nature of the action from termination for "conduct not satisfactory to the Agency during probational period" to "disqualification during probationary period." In connection with this notification, which was made retroactive to April 25, 1947, plaintiff was advised that War Department Regulation No. 105 did not apply but that Civilian Personnel Regulation No. 60 was applicable.

That part of Regulation No. 60, which deals with "Separation for Disqualification," provides in part as follo vs:

> *b.* Any employee, veteran or nonveteran, graded or ungraded, separated for disqualification will receive a statement setting forth the nature, date, specific reasons for the action, and right to reply. See *c* below.
>
> *c.* The employee, if he so desires, may reply to the statement of reasons. *No action will be taken to effect the separation under this paragraph of any employee until he has had sufficient opportunity to prepare affidavits or necessary evidence to substantiate his position.* The employee's reply will be considered carefully, in order to assure that the separation action is justified. The reply will be filed with the statement of reasons, * * *.
>
> * * * * *
>
> *Method of Effecting "Notification of Personnel Action."*
>
> *e.* (1) *Statement of reasons.*— The employee will receive the form, "Notification of Personnel Action," on or be-

fore the effective date of the separation action. There will be entered under "Remarks" a brief statement indicating the reason for the action.

(2) *Effective date.*—The effective date of the separation action *will be determined to allow at least 5 working days after receipt of the statement of reasons.* [Italics supplied.]

The second Notification of Personnel Action, issued August 26, 1947, and made effective as of April 25, 1947, was, if possible, a more flagrant example of noncompliance with regulations than was the first notification. Not only were no specific reasons given for the action, as required by the above-mentioned Civil Service regulations, and by War Department Regulation No. 60, but the action was made effective as of a date some months earlier, which made it impossible for the employee to have an opportunity to reply to reasons, if they had been given, and certainly not the five working days which was the minimum interval required by the regulation. It accordingly appears that this second notification was no more effective to terminate, remove or separate plaintiff than was the first.[3]

It was not until October 13, 1947, that the Army gave plaintiff a statement in writing of the reasons for her separation from duty on April 25, 1947. Although the letter commenced by saying that the statement of reasons was given in accordance with Civilian Personnel Regulation 60.3–5*b*, it it obvious that there was no compliance with Civilian Personnel Regulation 60.3–5*c* (1) which provided that the employee should receive the Notification of Personnel Action on or before the effective date of the separation action and that a statement indicating the reasons for the action would appear on that notification. Furthermore, a statement made in October, of the reasons for a separation for disqualification effective in the prior April, gave scant attention to Civilian Personnel Regulation 60.3*c* which provided that no action would be taken to effect the separation of a War Department employee until he had had opportunity to reply

[3] Defendant has made an attempt to distinguish between these types of personnel actions. Chapter S1 of the Federal Personnel Manual, July 9, 1946, provides on page 2: "The term 'removed' in the Lloyd-LaFollette Act covers not only removals as defined on page S1–4, but also separations based on disqualification, disability, or inefficiency if the separations are made without the employee's consent and are initiated by the agency."

to the reasons given as required in Civilian Personnel Regulation 60.3*b*.

We do not think that the giving in October 1947 of a statement of reasons for plaintiff's termination corrected the procedural defects in previous unlawful attempts to terminate plaintiff's service on April 25, 1947, and on August 26, 1947. The fact that a few days prior to the date of the statement of October 13, 1947, plaintiff would have completed her probationary period, suggest that by that time she was entitled to the full protection of section 6 of the Lloyd-LaFollette Act. However, it is not necessary to discuss that possibility since it seems clear to us that the Government is liable on the basis of its failure to comply with the Civil Service regulation applicable to removal of probationary employees and with the applicable War Department regulations referred to herein. The War Department regulations and Civil Service Regulation 7.2 (3) required that before a probational appointee could be separated for unsatisfactory conduct or service, that appointee must be given in writing a full statement of the reasons why his conduct or services were not satisfactory. This was not done and the giving of such reasons months after plaintiff had been separated from her position did not cure this fatal defect.

Finally, we do not think the majority is correct in granting summary judgment to defendant on the present state of the pleadings. While in general, summary judgment may be granted to non-moving parties, despite the failure of either the Federal Rules or the rules of this court to cover the point, that is so only where the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of any material fact to be tried. Assuming without admitting that the majority is correct in holding that plaintiff was accorded by defendant full compliance with the Civil Service regulation 7.2 (3) relating to the method to be followed in separating probational employees, it would follow, of course, that her motion for summary judgment on that point should be denied. And if that were the *only issue* raised in the case, then summary judgment could be granted to the non-moving defendant and the petition dismissed. However, as defendant itself points out in resisting plaintiff's motion for

summary judgment, plaintiff's petition and the supporting documents purport to make out a cause of action based on arbitrary action by the War Department officials, and defendant, thinking this to be a sound ground for recovery, if proved, insisted that the case should go to trial on this issue. Probably because her claim based on allegations of procedural defects would require no trial, whereas her claim based on allegations of arbitrary action would require a trial, plaintiff decided to move for summary judgment on her procedural defect claim, supported by documentary evidence and affidavits. Upon the court's decision that her claim for recovery on the basis of procedural defect is not supported by the record, plaintiff should then have an opportunity to go to trial on the other portion of her case involving her claim of arbitrary dismissal. That it would be error for the court to render judgment for defendant and dismiss the petition at this stage, is illustrated by the case of *Filson* v. *Fountain*, 171 F. 2d 999.

In that case plaintiff alleged that the defendant had acquired certain realty subject to a resulting trust in favor of plaintiff in the amount of $6,000 and prayed for judgment in that amount *and for other relief*. Defendant's answer denied the existence of the alleged resulting trust and also the existence of any other obligation on his part to the plaintiff. Defendant then moved for summary judgment on the sole ground that under applicable State law there could be no resulting trust in favor of the plaintiff, ignoring in his motion and briefs plaintiff's general prayer for "other relief". The District Court held that under applicable State law no resulting trust had arisen in favor of plaintiff. The court granted the defendant's motion for summary judgment and ordered the petition dismissed. The Court of Appeals agreed with the District Court that under State law no resulting trust arose in favor of plaintiff but it held that the granting of summary judgment for the defendant and the dismissal of the complaint was erroneous because the complaint contained a general prayer for "other relief" and alleged facts on the basis of which the Court of Appeals felt that a personal judgment of $6,000 could and should have been recovered by plaintiff even in the absence of a resulting trust. The appellate court then went on to examine the case

and to find that such a personal obligation did exist. It remanded the case to the trial court with instructions to enter a personal judgment in favor of the plaintiff for $6,000. Defendant filed a timely motion for a modification of the order of the Court of Appeals in order to permit a trial as to the existence of the personal obligation which defendant had denied in his answer and which had not been the subject of defendant's motion for summary judgment. This motion for a modification of the order was denied, and defendant petitioned for certiorari, attacking only that portion of the Court of Appeals' ruling which ordered the District Court to enter judgment for plaintiff on the personal obligation of defendant in the amount of $6,000. The Supreme Court (336 U. S. 681) reversed the Court of Appeals on this one point on the ground that the order to enter judgment was on an issue *not* litigated in the motion for summary judgment and as to which defendant had had no opportunity to present a defense before the trial court. The court stated:

> Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for Mrs. Fountain [defendant] to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain [defendant] of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.

The case was accordingly remanded to the District Court for further proceedings on the question of Mrs. Fountain's alleged personal obligation to plaintiff.

As will be noted, the decision of the Supreme Court reversed the mandate of the Circuit Court requiring the District Court to enter judgment for plaintiff on the personal liability of $6,000 owed her by defendant. It did not reverse the holding of the Circuit Court that it was error for the District Court to enter summary judgment for defendant on one claim where there was another claim stated in the petition, placed in issue by the answer, and which had not

been litigated in the motion for summary judgment. We believe the same principle applies in the instant case and that at the very least this case should be remanded to a commissioner of the court for trial on the issue of arbitrary dismissal. While resolution of that issue will undoubtedly require testimony, particularly from the officer who initiated the dismissal proceedings, the record now before the court on plaintiff's motion for summary judgment gives many strong indications of arbitrary action on the part of War Department officials. To mention only a few, plaintiff's efficiency ratings for her first few months of service carried the final rating of "Good"; the presence of plus marks, indicating outstanding performance, on most of the underlined (essential) elements on the rating form suggests that the final rating was in error and should have been "Very Good". In any event, plaintiff thought that some faulty arithmetic had been indulged in by the rating official and she appealed to the chairman of the Efficiency Rating Board of Review. That official, Major W. J. Warren, also happened to be plaintiff's supervisor in the Finance Department and the man who initialed his approval on her second efficiency rating from which she was appealing. Instead of replying to her appeal for a review of her rating, which appeal was dated April 4, 1947, Major Warren, acting in his capacity as Assistant, Finance Department, on April 14, 1947, sent plaintiff the complained of notice of separation in which he merely stated that her services had not been satisfactory. Apparently no action was ever taken or even contemplated with respect to plaintiff's appeal from her efficiency rating of "Good". In fact, it appears that one of the reasons[4] why her conduct was considered "not satisfactory" to Major Warren was because she appealed the efficiency rating which he had approved, since, in the statement of reasons for her dismissal, finally given to her on October 13, 1947, one of the reasons stated

[4] The majority opinion says that one of the reasons for plaintiff's removal finally given her in the letter of October 13, 1947 was that "she had insisted that any criticism of her work by her superiors should be put in writing." We do not find any such reason in that letter. The nearest thing to it is the statement: "It was also reported that you refused to accept a decision made by a Branch head unless put in writing." That a "decision made by a Branch head" consisted of a criticism of plaintiff's work, seems to us to be an unwarranted conclusion.

was that she had complained of the efficiency rating given her. A reading of the letters addressed to plaintiff by various Army officers in the course of her long fight to unsnarl the procedural mess into which her separation had become involved, reveals a scarcely veiled hostility on the part of those officers and a sense of bureaucratic outrage that a CAF-2 clerk-typist should dare to question the "administrative prerogative vested in the Finance Officer, U. S. Army". (See letter of October 6, 1947, referred to earlier herein.)

Civil Service Regulations relating to probationary employees provide that they shall be given a "full and *fair* trial". Even on the present record such a trial would not seem to have been given this plaintiff. Assuming that the employing official had the discretion to form a judgment of plaintiff's performance and behavior, any decision reached by him to separate such an employee must be made in good faith, as this court held in the case of *Dwight Crocker* v. *United States*, 130 C. Cls. 567. In the *Crocker* case the employing official was required to make a determination whether or not to reinstate plaintiff in the job from which he had been separated. On the theory that employee morale would be damaged if the other employees should learn that management had made a mistake in dismissing plaintiff, defendant refused to reinstate plaintiff. The court held that such a refusal to reinstate was not made in good faith and was arbitrary and that accordingly this court had power to review the decision and set it aside.

We think that this plaintiff is entitled to a trial on the issue of the good faith of the Army officials in bringing about her removal. See also *Elizabeth P. Knotts* v. *United States*, 128 C. Cls. 489.

In conclusion, we would grant plaintiff's motion for summary judgment on the grounds (1) that a validly issued regulation of the Civil Service Commission (issued pursuant to the Act of 1883) applicable to the separation of probationary employees, was not complied with; and (2) that regulations of the War Department applicable to the separation of probationary civilian employees, and issued pursuant to proper regulations of the Civil Service Commission and approved by the President, were not complied with. Finally, we would, in any event, remand the case to a commissioner

of the court for a trial on the issue of the arbitrariness of plaintiff's dismissal, an issue not relied on in the motion for summary judgment, but an issue which was denied by defendant in its answer and which, if proved, would entitle plaintiff to recover her back pay.

U. S. GOVERNMENT PRINTING OFFICE: 1987

In the United States Court of Claims

No. 49895

(Decided March 6, 1957)

HELEN I. WATSON v. THE UNITED STATES

Mr. Rees B. Gillespie for the plaintiff.

Miss Frances L. Nunn, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant.

ON PLAINTIFF'S MOTION FOR A NEW TRIAL AND MOTION FOR LEAVE TO FILE AMENDED PETITION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff moves for a rehearing, alleging that the opinion and judgment of the court dismissing her petition was contrary to law. She also asks leave to amend her petition so as to assert rights under Revised Statutes 161, 5 U. S. C. 22, which gives to the head of each department of the United States Government the authority to prescribe regulations for the conduct of its officers and employees. She alleges that the regulations of the War Department were issued pursuant to the authority of this statute, and that since these regulations were not observed, she is entitled to a judgment.

This position cannot be sustained. Many regulations are issued by the various departments governing their personnel for the guidance of the officers and agents in the departments, but the violation of them creates no right of action in the employee. Only Congress can create a right of action against the United States. This principle is recognized and relied on in the cases cited below.

On January 16, 1883 (22 Stat. 403), Congress passed the Civil Service Act, which created the Civil Service Commission, and which provided for the appointment of employees

of the Federal Government after competitive examination. It contained no reference to removals from office, except in section 13, which prohibited the discharge or demotion of any officer or employee, but only for this reason,—"for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose." However, pursuant to the authority therein granted to make "suitable rules for carrying this Act into effect," the President, through the Civil Service Commission, promulgated a rule providing for a probationary period of six months before a permanent appointment in the Civil Service. Whether or not this rule gave to the plaintiff, a probationary appointee, who was suspended prior to the expiration of six months, a right of action against the United States, was before the court in *Ruggles* v. *United States*, 45 C. Cls. 86. The Court, in an opinion by Chief Justice Peelle, said on pages 88–89:

> * * * Such rules, though effective to regulate the conduct of subordinates subject to executive authority, may at the will of the Executive be rescinded; consequently it has been held that no vested right is acquired by the incumbent of an office by virtue of such regulation. (*Carr* v. *Gordon*, 82 Fed. Rep., 373, 379; *Page* v. *Moffett*, 85 Fed. Rep., 38–40.)
>
> Paragraph 4 of section 2 of the civil-service act of January 16, 1883 (22 Stat. L., 403), provides for "a period of probation before any absolute appointment or employment" is made; and therefore it may be said that the executive regulation fixing the probationary period at six months has the force of law; yet neither the statute nor the regulation can be construed to bind the Government to retain in its employ an appointee who is found inefficient.
>
> The civil-service act does not prescribe the tenure of office, nor was it intended to restrict the Executive in his power of removal or discharge of an officer subject to his appointment, except as provided by section 13, which in substance provides that no officer shall be discharged, promoted, or degraded for giving, withholding, or neglecting to make contributions for political purposes. This was the view of Circuit Judge Lurton in the case of *Morgan* v. *Nunn* (84 Fed. Rep., 551, 552), which was an action to enjoin an internal-revenue collector from the removal of a clerk in the classified service for political reasons, in respect to which the court, among other

things, said: "It is now well settled that, in the absence of constitutional or statutory regulation, the power of appointment carries with it, as an incident, the power to remove. This was first authoritatively determined in respect to appointments vested by the Constitution, or by acts of Congress, in the President, judges of United States courts, and heads of departments, in the case reported as *In re Hennen* (13 Pet., 230), the question there being as to the power of a district judge to remove a district court clerk. The doctrine in that case was followed in an elaborate opinion in *Parsons* v. *United States* (167 U. S., 324)."

In *William A. Miller* v. *United States*, 45 C. Cls. 509, a printer had been discharged by the Public Printer and later reinstated, pursuant to a finding of wrongful discharge by the Civil Service Commission. He sued for his salary during the time of his suspension, alleging that his suspension was in violation of the regulation prohibiting removal except "for such cause as will promote the efficiency of the service, and for reasons given in writing," and after an opportunity to answer. The court dismissed his petition, saying that the Public Printer had the power of removal, notwithstanding the quoted regulation, and that the court could not go behind his act.

In *Morgan* v. *Nunn*, 84 Fed. 551, Mr. Justice Lurton, then Circuit Judge, also considered the power of removal after the passage of the Act of January 16, 1883. Of this Act he said:

> The Act of January 16, 1883, commonly called the "Civil Service Act," deals in no direct way with the tenure of office of those persons then, or who might thereafter be, included within the classified service. Nor does it make any declaration expressly bearing upon the subject of removals from office, except in the single provision found in the thirteenth section, which prohibits any promotion, degradation, removal, or discharge of any officer or employé for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose. It is now well settled that, in the absence of constitutional or statutory regulation, the power of appointment carried with it, as an incident, the power to remove. This was first authoritatively determined in respect to appointments vested by the constitution, or by act of congress, in the President, judges of United States courts, and heads of de-

partments, in the case reported as In re Hennen, 13 Pet. 230; the question there being as to the power of a district judge to remove a district court clerk. The doctrine of that case was followed, in an elaborate opinion, in Parsons v. United States, 167 U. S. 324, 17 Sup. Ct. 880. The civil service act prescribes no tenure of office, and does not deny the power of removal, except in the particular mentioned. The executive rules in force prior to November 2, 1896, in no way undertook to regulate removals; and it is a part of the history of the country that removals were constantly made, at the will of the appointing power, down to the promulgation of the amended rules of November 2, 1896, and those of July 27, 1897.

He then quoted the rule promulgated by the President on July 27, 1897, reading:

> No removal shall be made from any position subject to competitive examination, except for just cause, and upon written charges filed with the head of the department, or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense.

Of this rule he said:

> It is said that the civil service rules, so far as they deny the unrestrained power of removal, are not the law of the land, but are mere executive orders, dependent for their force upon the vigilance and earnestness of the chief executive in compelling his appointees to regard and obey regulations voluntarily imposed by him as a regulation by the appointing power of its otherwise unrestrained liberty of removal. To this contention I am constrained to yield my assent. These rules regulating the power of removal were made by the president, and may be repealed, altered, or amended at his pleasure. Prior to November 2, 1896, no such restraints existed; and, if after that date they came into force, it was alone by virtue of an executive order. Law is not thus enacted, altered, or amended. Law must be an expression of a rule of action by the legislative authority. These civil service rules, so far as they deal with the executive right of removal,—a right which is but an incident of the power of appointment,—are but expressions of the will of the president, and are regulations imposed by him upon his own action, or that of heads of departments appointed by him. He can enforce them by requiring obedience to them on penalty of removal. But they do

> not give to the employés within the classified civil service any such tenure of office as to confer upon them a property right in the office or place.

The only restriction on the power of removal contained in the Act of January 16, 1883, is removal for political reasons. Although the President undertook to prohibit removals, except for just cause, and upon notice, and with an opportunity to make defense, the courts have nevertheless held that this regulation conferred no property right on the employee, and that the rule was enforceable only by the President himself, and conferred no rights on the employee which could be enforced in court. In addition to the above cases, it was so held in *Carr* v. *Gordon*, 82 Fed. 373; *Flemming* v. *Stahl*, 83 Fed. 940; and *Page, et al.* v. *Moffett*, 85 Fed. 38. See the opinions in each of these cases.

In *United States* v. *Wickersham*, 201 U. S. 390, there was involved the removal of an employee by a subordinate officer who had no authority to do so. His removal had not been approved by the head of the department, but, on the contrary, had been criticized by him; the court did not decide what his rights would have been had he been discharged by the head of the department. It said, at page 399:

> Whether he could have been summarily removed or suspended by the President or other competent authority is not the question now before the court, but the question is whether the employé during his wrongful suspension by a subordinate officer is entitled to the compensation provided by law.

This court in *Ruggles* v. *United States*, *supra*, said that the *Wickersham* case was not applicable to the removal of a probationary appointee by competent authority before the probationary period, fixed by the Civil Service Commission regulation, had expired, and that such removal gave the employee no right of action in court.

Except for the Act of January 16, 1883, prohibiting discharges for political reasons, the only Act which gives to a non-veteran employee a right of action for a wrongful discharge is the Lloyd-LaFollette Act of August 24, 1912, 5 U. S. C. 652. This Act provides that no employee *in the classified civil service* shall be discharged except for the good of the service, and after a certain procedure has been fol-

lowed. A violation of this statute creates a right in an employee, for the violation of which the United States is liable. But in *Nadelhaft* v. *United States*, 132 C. Cls. 316, we held that since the prohibition against removal, except for cause, applies only to employees in the classified civil service, a probationary employee was not entitled to its protection, since he was not in the classified civil service until he had served out his probationary period. Since this Act has not been violated, and since plaintiff in the instant case has not been discharged for political reasons, she has no right of action against the Government.

Neither the Act of January 16, 1883, nor the Act of August 24, 1912 restricted the power of removal of persons not in the civil service; and, hence, no regulation that was designed to do so could confer on such a person a vested right to his position, for the deprivation of which he had a right of action against the United States. See cases cited *supra*.

Plaintiff files a motion to amend her petition so as to claim rights arising under R. S. 161, instead of the Lloyd-LaFollette Act of 1912. Since, in our opinion, plaintiff acquired no rights under R. S. 161, it would be futile to allow the amendment of her petition so as to claim rights thereunder.

For these reasons the motions for leave to amend her petition and for a rehearing are denied.

It is so ordered.

LARAMORE, *Judge;* and JONES, *Chief Judge*, concur.

LITTLETON, *Judge*, and MADDEN, *Judge*, dissenting:

We would grant plaintiff's motion for leave to amend her petition. The proposed amendment does not alter the nature or extent of plaintiff's claim but merely alters the original petition to show the correct statutory authority for the regulations on which plaintiff bases her claim, i. e., the act of March 3, 1871, R. S. 1753, 16 Stat. 495, 514, the act of January 16, 1883, 22 Stat. 403, and R. S. 161, 5 U. S. C. 22, and to eliminate all reference to the Lloyd-LaFollette Act of August 24, 1912, 37 Stat. 539, 555. Although the majority is of the opinion that the proposed amendments, if permitted, would not affect the outcome of the case, adverse to plaintiff, we think plaintiff should be permitted to make the corrections

desired in view of the fact that she may decide to seek a review of this court's decision.

We do not agree with the conclusion reached by the majority to the effect that no claim within the jurisdiction of the court arises upon the violation by the United States of a Civil Service or departmental regulation prescribing the manner in which a probationary employee may be removed from her government position.

The Civil Service regulation covering removals of probationary employees in effect at the time of plaintiff's separation, on April 25, 1947, appears at 5 Code of Federal Regulations, § 27.7 (d), 1946 Supplement, and provides in pertinent part as follows:

> (d) *Probationary appointment.* A person selected for appointment shall be duly notified by the appointing officer and upon accepting and reporting for duty shall receive from such officer a notice of probationary appointment. The first year of service under this appointment shall be a probationary period: * * * If and when, after a full and fair trial, the conduct, capacity or efficiency of the probationer is not satisfactory to the appointing officer, the probationer shall, prior to the completion of his probationary period, be so notified in writing, *with a statement of reasons*, and this notice shall terminate his service. [Italics supplied.]

The above regulation was issued pursuant to Executive Order 9691 of February 4, 1946, 3 Code of Federal Regulations, 1946 Supplement, p. 95, and the Executive Order was issued under authority of sections 2 and 3 of the Civil Service Act of 1883, 22 Stat. 403, and section 1753 of the Revised Statutes. The regulation, to the extent quoted, had been in effect in almost identical form for a number of years. See 5 Code of Federal Regulations, § 7.2 (3), 1938 Supplement, issued pursuant to Executive Order 7915 of June 24, 1938, Rule VII Certification, 2 (c), 3 Code of Federal Regulations, 1938 Supplement, p. 52, issued pursuant to section 1753 of the Revised Statutes, the Civil Service Act of 1883, *supra*, and the authority vested in the President by the Constitution.

The departmental regulation relied on by plaintiff, and in effect at the time of her discharge, was War Department Civilian Personnel Regulation No. 60, issued pursuant to

section 161 of the Revised Statues (1773–1774), 5 U. S. C. § 22, which provides as follows:"

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Regulation No. 60 of the War Department, issued pursuant to the above statute, provided, among other things, that civilian personnel of that department, including those serving a probationary or trial period, should, upon discharge, receive a notice containing a statement of the reasons for the separation and an opportunity to reply thereto.

Neither the Civil Service regulation nor the War Department regulation was complied with upon the occasion of plaintiff's discharge, and the question before the court is whether the violation of either or both of these regulations gave rise to a claim for pay against the United States within the meaning of section 1491 of Title 28 of the United States Code as a claim founded upon a regulation of an executive department. This question was decided in *Simon* v. *United States*, 113 C. Cls. 182.

With respect to the Civil Service regulation relied on by plaintiff, and issued pursuant to R. S. 1753 and the Civil Service Act of 1883, *supra*, the majority holds that such regulation prescribing the manner in which a probationary employee may be separated from government service does not have the force and effect of law, and its violation, therefore, does not form the basis for a claim for pay within the jurisdiction of this court. The majority points out that the 1883 Civil Service Act places no restriction on the right of an appointing official to remove employees appointed pursuant to that Act, except in § 13, which prohibits removals for withholding political contributions. The majority further states that the cases have uniformly held that regulations issued pursuant to the 1883 Act, which purported to place additional restriction on the power of removal, conferred upon employees covered by such regulation no rights against the United States which could be enforced in any court.

A careful study of the cases cited in the majority opinion

persuades us that they do not justify the result reached by the court in the instant case.

In the Circuit Court cases relied on by the majority, and discussed hereinafter, the courts were concerned with a Civil Service procedural regulation promulgated by Executive Order of July 27, 1897, pursuant to the 1883 Civil Service Act. That regulation provided that no removal of an employee in the Civil Service could be made except for just cause and must be upon written charges filed with the head of the department concerned, or other appointing officer, and with full notice to the employee, who must have an opportunity to make a defense. In each Circuit Court case cited the suit was one for an injunction on the equity side of the court seeking restraint of the threatened removal in violation of the Executive Order, and the question for decision in each case was whether the procedural regulation gave to the employee in question such tenure of office as to confer upon him a property right in the office of which a court of equity could take cognizance. An early case involving this question was *Carr* v. *Gordon*, 82 Fed. 373 (1897). In that case Carr applied to the District Court for a writ of injunction to restrain his threatened removal from his position in the United States Post Office Department in Chicago, alleging that the proposed removal would be in violation of his rights under the Civil Service Act and the rules promulgated pursuant thereto by the President, particularly that rule issued through the Executive Order of July 27, 1897, in that plaintiff had not received notice of the intention of the appointing official to remove him, with a statement of charges, and an opportunity to make a defense to the charges. The Circuit Court pointed out that the jurisdiction of a court of equity, unless enlarged by statute, is limited to the protection of *property* rights; that it exercises no jurisdiction in "matters merely political, *illegal*, criminal, or immoral," citing and quoting from *World's Columbian Exposition* v. *United States*, 56 Fed. 654, and *In Re Sawyer*, 124 U. S. 200. In the latter case, the Supreme Court, at p. 210, had the following to say of the jurisdiction of a Court of Equity:

> * * * It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers.

> To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to *invade the domain of the courts of commonlaw*, or of the executive and administrative department of the government. [Italics supplied.]

The Circuit Court reviewed the Civil Service Act of March 3, 1871, R. S. 1753, 16 Stat., Ch. 114, Sec. 9, 514, and the act of 1883, 22 Stat. 403, and held that nothing in those Acts could be construed as conferring upon a person appointed thereunder any vested right in the government office or job; that the only restriction placed upon the power of removal from a government office or job was the provision in the 1883 law prohibiting removals for giving or failing to give political service, and the court concluded that the fact that the law prohibited removals for one particular cause was strong evidence to show that it was not designed to forbid removals for other causes. The court concluded that since the Civil Service statute under which the 1897 regulation in question was issued conferred on the plaintiff no vested property right in his job enforceable in a court of equity, the regulation could not do so and the injunction was denied.

The holding in *Carr* v. *Gordon*, *supra*, was followed in a number of subsequent cases involving the same issue, i. e., the jurisdiction of a court of equity to grant an injunction to restrain a threatened removal of a Civil Service employee in violation of the Executive Order of July 27, 1897. *Flemming* v. *Stahl*, 83 Fed. 940 (1897); *Morgan* v. *Nunn*, 84 Fed. 551 (1898); *Page* v. *Moffett*, 85 Fed. 38 (1898). In each case the court held that it had no jurisdiction to issue the injunction because no property right was involved and that jurisdiction to determine title to a public office belonged exclusively to courts of law to be exercised either by certiorari, error or appeal, by mandamus, prohibition, quo warranto, or an information in the nature of a writ of quo warranto, according to the necessities of the case.

A conflict existed at that time between the holdings of circuits, as exemplified by the holding in *Butler* v. *White*, 83 Fed. 578 (1897), in which the court granted an injunction restraining a threatened removal in violation of the terms of the Presidential Order of July 27, 1897. This con-

flict was resolved in *White* v. *Berry*, 171 U. S. 366, in a decision upholding the conclusions reached by the courts following the holding in *Carr* v. *Gordon*, *supra*, i. e., that courts of equity have no jurisdiction over the appointment or removal of public officers and that the jurisdiction to determine title to public office belongs exclusively to the courts of law.

The question therefore arises: what, if any, application have the holdings above noted in the equity cases to *suits for pay* founded upon an alleged wrongful and *illegal* removal of a government employee covered by the Civil Service Act of 1883 (and not by the Lloyd-LaFollette Act of 1912)?

In *Ruggles* v. *United States*, 45 C. Cls. 86 (1910), cited by the majority herein and quoted at some length, the cases of *Carr* v. *Gordon*, *Page* v. *Moffett*, and *Morgan* v. *Nunn*, *supra*, are relied on as holding that no vested right in a government office is acquired by virtue of certain executive regulations. *Ruggles* had received an appointment in the War Department for a probationary period of six months. Before the expiration of the six months, Ruggles was suspended by the quartermaster without pay on the ground that he was not qualified for the duties of the office, of which fact he was notified in writing. Thereafter charges were preferred, investigated, and sustained. Ultimately, his suspension without pay was ratified by the Secretary of War and Ruggles was discharged. Ruggles sued to recover his pay during the balance of the six-months' probationary period because, he claimed, he could not legally be removed during that period under the Civil Service Act of 1883, and a Presidential regulation promulgated thereunder. The regulation relied on by Ruggles was apparently that of January 2, 1897, providing that a probationary appointee should receive a certificate of appointment for a probationary period of six months. See *Brown* v. *United States*, 39 C. Cls. 255. The court held that neither paragraph 4 of section 2 of the Civil Service Act, providing for a period of probation before any absolute appointment, nor the regulation of January 2, 1897, providing that the probationary period should be for six months, created in the probationary appointee a vested right in his job for six months and that the Government was free to remove him if his services were found to be inadequate or not needed. The particular regulation which was before the circuit courts

in the cases of *Carr*, *Morgan* and *Page*, *supra*, was the 1897 Executive Order requiring that removals for cause be made upon notice, written charges, and with an opportunity to defend, and such regulation was *not* before the court in the *Ruggles* case for the reason, as pointed out by the court, pp. 89, 90, that the provisions of that regulation had been fully complied with:

> But in the present case as the claimant was suspended without pay for inefficiency, upon written charges which were investigated and found to be true, we need not further consider the force and effect of the rules promulgated by the Executive in respect to removals from office during the probationary period of an appointee. The claimant was removed in compliance with the rules of the civil service promulgated by the President; and we may add that the rule prohibiting removals except upon written charges, with notice and an opportunity to defend, of itself implies removal for just cause during the probationary period.
>
> This is not the case of a wrongful suspension of an employee by a subordinate officer, as in the *Wickersham case* (201 U. S. 390), but was a suspension followed by removal for just cause upon written charges, *as prescribed by the rules* of the civil service promulgated by the President, *and for that reason the demurrer is sustained and the petition dismissed.* [Italics supplied.]

From the above it appears that the holding in the *Ruggles* case is *not* authority for concluding that violation of the *procedural requirements* for removal of a government employee prescribed by an executive order issued under the 1883 Civil Service Act does not give rise to a claim for pay within the jurisdiction of the Court of Claims.

Another case relied on by the majority is that of *Miller* v. *United States*, 45 C. Cls. 509 (1910). In that case, Miller was discharged by the appointing official, the Public Printer. He was first suspended until final action could be taken on charges which had been preferred and of which he was advised, including the reasons therefor. The Public Printer, being satisfied that Miller's removal would be for the good of the service, ordered his discharge. Subsequently, the Civil Service Commission held Miller's discharge improper and recommended his reinstatement. Thereafter, the Presi-

dent of the United States also ordered Miller's reinstatement, which order was carried out. Miller did not base his claim for pay on the violation of any of the *procedural requirements* in the Civil Service rules, but on the fact that because the Civil Service Commission had found that his removal was not one that would promote the efficiency of the service, his removal was illegal and void. The court held that the power or discretion to determine whether the removal of a government employee *would promote the efficiency of the public service* was a matter left in the sole discretion of the Public Printer, as the appointing officer, and the fact that the Civil Service Commission disagreed with the Public Printer on this point did not render the discharged *illegal*. From all that appears in the opinion and the record in the *Miller* case, all *procedural regulations* applicable to his removal had been complied with.

A case which appears to be identical in most respects with the *Miller* case, *supra*, was that of *Eberlein* v. *United States*, 53 C. Cls. 466 (1918), affirmed, 257 U. S. 82 (1921). In the *Eberlein* case, the plaintiff, a customs employee, had been removed on charges, without pay, pending an investigation of such charges which were found to be established and Eberlein was discharged from the service. Two years later, the charges were reinvestigated and plaintiff was cleared thereof. The President directed reinstatement of Eberlein and thereafter Eberlein sued for back pay for the period of alleged wrongful suspension. In affirming the judgment of dismissal by the Court of Claims the Supreme Court noted that *all the procedures required by law and regulation were complied with* in connection with the suspension and removal of Eberlein, and the Court held that since all procedural requirements had been met, the action of the appointing official was not subject to revision in the courts, since it appeared that the *discretion of the authorized officer had been exercised "as required by law."* With respect to the reinstatement order of the President, the Supreme Court held that the power of appointment and removal of this particular employee had, by act of Congress, been placed in the Secretary of the Treasury rather than in the President and that therefore the order of the President merely reinstated

Eberlein to eligibility for reappointment in the government service.[1]

Neither the *Miller* nor the *Eberlein* case holds that a government employee, whose removal is in violation of the *procedural requirements* of a regulation, issued pursuant to the 1883 Civil Service Act, has no claim for pay lost by reason of such removal.

We next consider the case of *Wickersham* v. *United States*, 201 U. S. 390 (1906), which, in our opinion, is the closest in point with the case under consideration in that it involved the right of a government employee to sue for back pay in the Court of Claims where his discharge was in violation of the procedural requirements of a regulation issued pursuant to the Civil Service Act of 1883. The regulation in question was not identical with the one in the instant case, but it did have two things in common with the regulation here involved: (1) it prescribed certain procedures to be followed in removing a government employee, and (2) it was issued under the authority of the Civil Service Act of 1883 and R. S. 1753.

Wickersham, an employee of the General Land Office, was summarily discharged by the Surveyor General on the ground that there was insufficient work in his office to warrant the continued employment of Wickersham. When, shortly thereafter, the Surveyor General requested permission of the Commissioner of the General Land Office to employ additional clerical help to cope with a backlog of work, he was advised that his action in dispensing with the services of Wickersham and others was improper for two reasons: (1) that there was no lack of sufficient work to be done at the time of the removals, and (2) that the Surveyor General had failed to comply with the Civil Service regulation requiring that written charges be filed with the department head or other appointing officer "of which the accused

---

[1] The Constitution provides in Article II, section 2, clause 2, with respect to the powers and duties of the President, in part as follows:

"* * * and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: *but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.*" [Italics supplied.]

shall have full notice, and an opportunity to make defense." [2] The Commissioner directed the Surveyor General to reinstate Wickersham and the others similarly discharged, and to file charges against them in the prescribed manner if he deemed that advisable. Wickersham was accordingly reinstated by the Surveyor General who then preferred charges against him and suspended him pending investigation. The charges were not sustained and the Commissioner of the General Land Office offered Wickersham another position outside the office of the Surveyor General. Upon his refusal of the offered position, the Commissioner made the suspension of Wickersham permanent. Thereafter, Wickersham brought suit in the Court of Claims for the pay lost during the period of his first suspension and up to the date of his reinstatement by the Surveyor General. Judgment for Wickersham was entered by the court, without opinion, and the Government appealed. In his brief in the Supreme Court, Wickersham took the position that although he was not appointed to office by the President, he was, on May 6, 1896, put under Civil Service by an executive order of that date and by the corresponding order of the Secretary of the Interior. The Government took the position that he was not in the Civil Service. Wickersham's position was sustained by the Supreme Court. Next, he contended that although the power to remove accompanies the power to appoint, the power to suspend does not follow the power to remove. The Supreme Court did not sustain this contention. Wickersham then urged that, as a member of the Civil Service, he was entitled to the protection of the Presidential order of July 27, 1897, and the corresponding rule of the Civil Service Commission requiring that a removal be accomplished upon written charges filed with the head of the department, with full notice and an opportunity to defend, and that it was accordingly beyond the authority of a superior officer to remove or suspend a civil service employee except in the manner prescribed in the order and rule. Our

[2] The full text of the regulation is as follows:

"No removal shall be made from any position subject to competitive examination, except for just cause, and upon written charges filed with the head of the department, or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense."

reading of the decision of the Supreme Court convinces us that these latter contentions of Wickersham were sustained.

Beginning on page 397, the Supreme Court discusses the scope of the Civil Service Act of 1883 to regulate and improve the Civil Service of the United States and states that its provisions "are broad and comprehensive." The Court then held that both the regulation of May 6, 1896, extending Civil Service coverage to certain officers and employees not theretofore covered, and the procedural regulation of July 27, 1897, providing for the manner in which their removals should be effected, were within the scope of the 1883 Act. With respect to the latter rule, the Supreme Court states at p. 398:

> * * * He [Wickersham] was, therefore, entitled to the protection of the President's order of July 27, 1897 (14 An. Rep. Civ. Serv. Comm. 133): "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense." If the contention of the Government be correct, and the attempted suspension by the surveyor-general was equivalent to a dismissal from office, such action would run counter to the requirements of the Presidential order just quoted. The action of the surveyor-general was not upon written charges, and no notice or opportunity to make defense was given to the accused, as provided in that order. The appellee being entitled to the protection of this order, and to have notice of the charges preferred, and an opportunity to make defense, the attempted removal, if such it was, was without legal effect; * * *.

The Supreme Court then noted, as pointed out by the majority herein, that it was not passing on the question of whether the President or some other competent authority could have (with impunity) summarily removed or suspended Wickersham because that question was not before the Court. The question which the Supreme Court felt was before it was whether an employee who had been suspended by a subordinate official in a manner violative of the executive order of the President was entitled to the compensation provided by law for the period of his suspension, and the Court held that he was so entitled.

We cannot agree with the interpretation by the majority of the *Wickersham* opinion as a holding that it involved only the removal of an employee by a subordinate officer "who had no authority to do so." The subordinate officer in question, the Surveyor General, did have authority to bring about the removal of the employees under him, provided he complied with the procedures outlined in the executive order and the Civil Service rule. Furthermore, we cannot agree with the statement of the majority of what this court said in the *Ruggles* case, *supra*, in distinguishing that case from the *Wickersham* case. What this court said of the *Wickersham* case in its opinion in the *Ruggles* case, was this:

> This is not the case of a wrongful suspension of an employee by a subordinate officer, as in the *Wickersham case* (201 U. S. 390), but was a suspension followed by removal for just cause *upon written charges as prescribed by the rules of the civil service promulgated by the President, and for that reason* the demurrer is sustained and the petition dismissed.

Earlier in the *Ruggles* opinion, the court distinguished the situation in *Ruggles* from that in *Lellmann's* case, 37 C. Cls. 128, on the ground that Ruggles, unlike Lellmann, was served with charges in writing and was given an opportunity to make defense. The facts in *Lellmann's* case were identical with those in the *Wickersham* case, and the holding of this court was specifically approved by the Supreme Court in its decision in the *Wickersham* opinion. Finally, the Court of Claims in the *Ruggles* opinion did *not* consider the applicability of the 1897 executive order covering removals from government office upon the removal of a *probationary* appointee, for the express reason that the procedures contained in the 1897 order had been fully complied with in the *Ruggles* case.

Until the decision in the instant case, the most recent decision of this court on the precise issue involved herein, was the case of *Simon* v. *United States*, 113 C. Cls. 182. In that case the majority of the court (four judges) held that a government employee removed from his job in violation of a Civil Service rule covering reductions in force, and issued pursuant to section 2 of the Civil Service Act of 1883, had a claim for pay during the period of wrongful suspension

within the jurisdiction of this court as a claim founded upon the regulation of an executive department, citing the *Wickersham* case.

In the *Simon* case, *supra*, the Government took the position that the Civil Service Act of 1883, and regulations issued thereunder, such as the reduction-in-force regulation involved in the *Simon* case, were not intended to create rights enforceable by the Court of Claims through a money judgment; that only where Congress expressly states in a statute authorizing regulations that violation of those regulations will give rise to a claim thereunder enforceable in the Court of Claims does this court have jurisdiction of a claim founded upon those regulations. In rejecting that contention, the court noted that the Civil Service Act of 1883 had been enacted some twenty years subsequent to the Act setting forth the jurisdiction of this court and, in enacting the 1883 Act and providing for the issuance of regulations thereunder, Congress was presumably aware that the Court of Claims had jurisdiction to render judgment on claims founded upon the regulations of an executive department, and did not consider it necessary to again declare that rights created under the 1883 Act and its regulations could be litigated in and determined by this court. While the Civil Service Act contained no provisions with respect to the procedures to be followed in removing employees from government service, regulations prescribing such procedures were certainly not in conflict with that statute, and a regulation promulgated to insure an orderly and fair manner of carrying out reductions in force was held to be a regulation or "suitable rule for carrying this act [1883] into effect." Subsequent to the decision of this court in the *Simon* case, Congress enacted Public Law 623 of June 10, 1948, 62 Stat. 354, amending section 6 of the Lloyd-LaFollette Act of August 24, 1912, 5 U. S. C. 652. The 1912 Act had nothing to do with reductions in force, but the 1948 amendment provided in subparagraph (b) (3) that any person removed or suspended without pay in a reduction in force, who, after appeal to proper authority, was reinstated to duty on the ground that the removal or suspension was unjustified or unwarranted, should be paid the compensation denied him for the period of wrongful sus-

pension. As noted in the committee reports, this authorization to grant back pay was not intended to affect the jurisdiction of the courts but rather to authorize the employing agencies to make such payments, the General Accounting Office having ruled that where an employee had not been in a duty status, the employing agency could not pay him.

The only ground upon which a removal during a reduction in force could be said to be "unjustified" or "unwarranted" would be that the Civil Service reduction-in-force regulation issued pursuant to the 1883 Act had not been followed. No statute of which we are aware provides for reductions in force or the manner in which they must be carried out. The reduction-in-force regulation itself cites as its authority the Civil Service Act of 1883 and Congress must have thought the regulation a valid and enforceable one to have provided in the 1948 Act that an employee discharged in violation thereof and later reinstated should be paid for the period of wrongful removal.

From our study of the cases mentioned herein above, we think the following observations are here pertinent. No Federal statute to date has conferred on a government employee holding an appointment under any of the Civil Service laws such a property right in the position to which he is appointed as will invoke the protection of a court of equity, since no such statute specifically denies to the President or some other appointing official the right of removal. Since no property right in a government job exists, equity will not enjoin the threatened removal of an incumbent in violation of a Presidential or Civil Service rule which prescribes the manner in which that removal must be made. In so holding, however, the courts of equity and the Supreme Court have, as hereinbefore mentioned, been careful to point out that in the event of an actual (as distinguished from threatened) removal of a government employee in violation of such an applicable procedural regulation, the employee has an adequate remedy at law. Where the employee has been removed in violation of such a procedural regulation, he may seek a declaratory judgment in the District Court declaring his removal illegal because in violation of a procedural regulation, *Borak* v. *Biddle*, 141 F. 2d 278, cert. denied, 323 U. S.

738, and, upon the failure of the Government to reinstate him, the court will grant a writ of mandamas ordering such reinstatement. Because the District Court has no jurisdiction to order or award back pay, such an employee must then bring suit for pay in the Court of Claims. *Borak* v. *United States*, 110 C. Cls. 236.

While a government employee may not secure an injunction to restrain a removal which is in violation of a procedural regulation applicable to removals; once that removal is effected in violation of the procedural regulation, the courts have held such a removal illegal, and the Court of Claims has rendered judgment for pay lost during such wrongful removal. *Lellmann* v. *United States*, *Wickersham* v. *United States*, and *Simon* v. *United States*, *supra*.

It is of some significance that neither the briefs of the parties in the Supreme Court nor the Court itself in its opinion in the *Wickersham* case, made any mention of the holdings of the Supreme Court in *White* v. *Berry*, *supra*, or of the Circuit Courts in *Carr* v. *Gordon*, *Page* v. *Moffett*, *Flemming* v. *Stahl*, and *Morgan* v. *Nunn*, *supra*, although all of those cases involved the same procedural regulation of the President of July 27, 1897 which was involved in the *Wickersham* case. We think the reason for this is that the equity cases have no application to the issues involved in a suit for pay where the ground for recovery asserted is the actual violation of a procedural regulation.

A regulation of an executive department which is not in conflict with existing law and which can be said to reasonably effectuate the purposes of the statute under which it was issued, is a regulation which has the force and effect of law and one upon which a claim within the jurisdiction of this court may be based. While it is true that the Civil Service Act of 1883 did not take from the appointing power the right to remove those employees whom he had appointed to office except a removal for political reasons (other reasons have since been added by subsequent law), a regulation issued pursuant to that law which merely prescribes the manner in which permitted removals shall be made does not seem to us to be a regulation in conflict or in excess of the 1883 statute. Such a regulation is not a restriction on the power to remove, but rather on the manner in which that power may

be exercised. Such a regulation was held by the Supreme Court in the *Wickersham* case to be clearly within the scope of the broad provisions of the 1883 Civil Service Act.

From the pleadings and papers in the instant case, it appears that this case has much in common with the *Wickersham* case. Plaintiff in the instant case was not summarily removed by the head of the War Department any more than was Wickersham summarily removed by the Secretary of the Interior or by the President and accordingly the excerpt quoted by the majority herein relative to the power of the President or department head to dismiss an employee has no more application to this case than it had to the Wickersham situation. Plaintiff herein was removed by a Major Warren, a subordinate officer in the Army Finance Office, and like the Surveyor General in the *Wickersham* case, Major Warren failed to observe and comply with the procedural regulation of the Civil Service Commission expressly applicable to the removal of a probationary employee. We are of the opinion that the removal of Miss Watson was as illegal as that of Wickersham and that she is entitled to recover on her claim for pay founded upon a valid regulation of the Civil Service Commission.

With respect to Civilian Personnel Regulation 60 of the War Department, issued pursuant to section 161 of the Revised Statutes, we are of the opinion that such regulation also has the force and effect of law so that an employee removed in violation of the procedures prescribed therein has a claim cognizable by this court.

In *Carter* v. *Forrestal*, 175 F. 2d 364, cert. denied, 338 U. S. 832, Carter, a civilian employee of the War Department, was discharged because he willfully avoided payment of his lawful debts. The discharge was made pursuant to a War Department regulation known as Orders T, issued pursuant to section 161 of the Revised Statutes, and providing that any employee who willfully and without sufficient excuse or reason neglects or avoids payment of lawful indebtedness will be discharged with prejudice. Carter appealed to the United States Civil Service Commission under the provisions of section 14 of the Veterans' Preference Act of 1944, 5 U. S. C. § 863, and the dismissal was sustained as not in violation of that Act. Thereupon, Carter brought

suit for a declaratory judgment and requested an order in the nature of a mandamus requiring his restoration to his civilian position in the Department of the Army. Carter urged, among other things, that the regulation, Orders T, was invalid. In rejecting this contention, the Circuit Court stated, at page 366:

> Neither do we find any merit in appellant's contentions that the War Department regulation (Orders T) was invalid. There is both constitutional authority, Constitution, Article II, Section 2, and statutory authority, Sec. 161, R. S., 5 U. S. C. A. § 22, authorizing the Secretary of War to promulgate regulations specifying what shall be considered grounds for the dismissal of an employee. * * *

In *Boske* v. *Comingore*, 177 U. S. 459, the Court, speaking of a departmental regulation, issued pursuant to section 161 of the Revised Statutes, stated, at page 470:

> * * * In determining whether the regulations promulgated by him [Secretary of the Treasury] are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.

The portion of Regulation 60 relied on by plaintiff prescribes certain procedures to be followed in the removal of civilian employees of the War Department, including probationary employees. We can see nothing in such a regulation which is inconsistent with law. The Lloyd-LaFollette Act merely provides that persons *in the classified civil service* shall be removed therefrom only under certain conditions and in a certain manner. That Act does not provide that persons not having classified status (such as probationary appointee, a temporary appointee or a war service appointee) may not be covered by Civil Service or departmental regulations prescribing substantially similar methods or procedures

to be followed in bringing about their removal. In fact, the Act says nothing about the removal of persons not in the classified civil service. Accordingly, we are unable to see how a regulation issued pursuant to the 1883 Act or pursuant to Revised Statute, section 161, and not dealing with persons having classified civil service status, can be in conflict with the 1912 Act.

This plaintiff does not urge that she had classified civil service status at the time of her discharge in 1947, nor does she claim the benefits of the Lloyd-LaFollette Act. She does, however, claim that as a regularly appointed probationary employee she is covered by the Civil Service Act of 1883, the Civil Service regulation relative to probationary employees issued pursuant thereto, and by Civilian Personnel Regulation 60 of the War Department, issued pursuant to section 161 of the Revised Statutes.[3]

We are of the opinion that both regulations relied on by plaintiff are valid regulations of an executive department not in conflict with any existing law and that her discharge in violation of such regulations gave rise to a claim founded upon a regulation of an executive department cognizable by this court. We would accordingly grant plaintiff's motion for a new trial. We would also give plaintiff leave to amend her petition to correct the errors in legal citations appearing in her present petition.

[3] Both regulations required that a probationary employee be notified in writing of the reasons why her conduct or capacity was not satisfactory.

U. S. GOVERNMENT PRINTING OFFICE: 1957

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Constitutional Provision

The Constitution, Article 2, Section 2, in speaking of the President, provides in pertinent part:

> "He * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

2. Statutes

The basic Civil Service Act of January 16, 1883, 22 Stat. 403, 5 U.S.C. 633, in Section 2 provides in part as follows:

> "First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect."
>
> "Fourth. There shall be a period of probation before any absolute appointment or employment aforesaid."

Section 7 of the 1883 Act, 5 U.S.C. 638, provides in part as follows:

> "* * * nor to take from the President any authority not inconsistent with sections * * * of this title, conferred by section 631 of this title;" (Note: Section 631 U.S.C. Title 5, is RS 1753.)

Section 1753 of the Revised Statutes, 5 U.S.C. 631, provides as follows:

> "The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service."

Section 161 of the Revised Statutes, 5 U.S.C. 22, provides as follows:

> "Departmental regulations. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property appertaining to it."

Section 1491 U.S.C. Title 28 provides in part as follows:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (2) Founded upon any Act of Congress; or
>
> (3) Founded upon any regulation of an executive department;"

3. Regulations

The pertinent part of War Department, Civilian Personnel Regulations, No. 60, on Separations, dated August 28, 1946, provides for Separation (Disqualification), (P. 14) and contains the following on Page 15:

> STATEMENT OF REASONS
>
> (b) Any employee, veteran or nonveteran, graded or ungraded, separated for disqualification will receive a

statement setting forth the nature, date, specific reasons for the action, and right to reply. See c below.

REPLY TO REASONS

(c) The employee, if he so desires, may reply to the statement of reasons. No action will be taken to effect the separation under this paragraph of any employee until he has had sufficient opportunity to prepare affidavits or necessary evidence to substantiate his position. The employee's reply will be considered carefully, in order to assure that the separation action is justified. The reply will be filed with the statement of reasons * * *.

METHOD OF EFFECTING

'Notification of Personnel Action'

(e) 1. *Statement of reasons*: The employee will receive the form, 'Notification of Personnel Action', on or before the effective date of the separation action. There will be entered under 'Remarks' a brief statement indicating the reason for the action.

(2) *Effective date*: The effective date of the separation action will be determined to allow at least 5 working days after receipt of the statement of reasons.

United States Civil Service Commission, Federal Personnel Manual, Transmittal Sheet No. 45, dated July 9, 1946, S1-2 provides in part as follows:

"*Employees covered.*—The procedural provisions of section 6 of the Lloyd-LaFollette Act apply only to employees in the classified service. The procedures prescribed by that section are not mandatory for probational or trial period employees, for temporary employees (including temporary appointees under section 2 of Temporary Civil Service Regulation VIII), or for employees in positions excepted from the Civil Service Act. The Agency may, however, if it so desires, follow those procedures for probational or trial period employees."

United States Civil Service Commission, Federal Personnel Manual, Transmittal Sheet No. 45, dated July 9, 1946, S1-21 provides in part as follows:

> "The notice to a person who is serving a probationary period must include a statement of the reasons for the separation, in writing. The notice to a person serving a trial period need merely state that his conduct is not satisfactory to the appointing officer."

DEPARTMENT OF THE ARMY
OFFICE OF THE DEPUTY CHIEF OF STAFF FOR PERSONNEL
WASHINGTON 25, D. C.

9 October 1956

Mr. Rees B. Gillespie,
Shoreham Building,
15th and H Streets, N. W.,
Washington, D. C.

Dear Mr. Gillespie:

Reference is made to your letter of 10 September 1956, in which you requested information as to the legal authority for the issuance of Department of the Army Civilian Personnel Regulations 60, dated 28 August 1946. The legal authority for the issuance of those regulations was R. S. 161, 5 U.S.C. 22. * * * At the time in question this matter was covered in Section 1 of CPR 1, dated 14 November 1945 (see attached).

Sincerely yours,

/s/ Robert M. Mangan
Chief, Procedures and
Regulations Division

1 Incl
Cpy Sec 1,
CPR 1, 14 Nov 45

PURPOSE AND SCOPE OF CIVILIAN PERSONNEL REGULATIONS

Basic legal authority 1-1
Purpose and scope 1-2
Distribution of issuances 1-3
Supplementary issuances at lower echelons 1-4

1-1. Basic legal authority: (A) Civilian personnel regulations governing civilian personnel administration in the War Department are issued by order of the Secretary of War pursuant to the provisions of Section 161, Revised Statutes (5 U.S.C. 22), which reads as follows:

The head of each department is authorized to prescribe regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

(b) Provisions of these regulations subject to the requirements of the Civil Service Commission, or of any other body possessing similar regulatory authority, are appropriately cleard and approved prior to publications.

1-2. Purpose and scope. (in part) * * * The provisions of all such regulations are permanent in nature and, except where specifically stated to be otherwise, mandatory in effect."